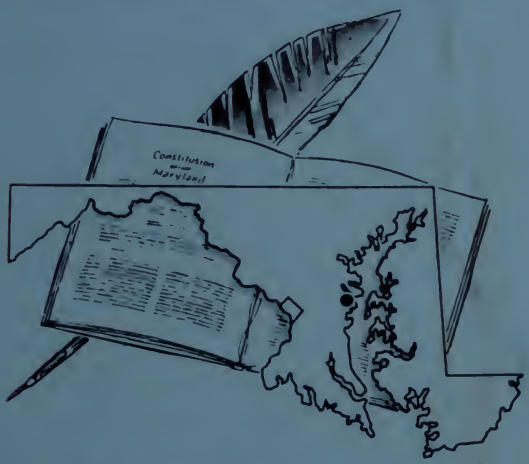
INTERIM REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION



MARYLAND-1967

Interim Report

of the

Constitutional Convention Commission

to

HIS EXCELLENCY, SPIRO T. AGNEW

GOVERNOR OF MARYLAND

and to

THE HONORABLE

THE GENERAL ASSEMBLY OF MARYLAND

Maryland

May 26, 1967

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MAY 26, 1967

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* * * * * *

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* * * * * *

[1] Deceased February 7, 1967.
[2] Resigned January 5, 1966.
[3] Resigned May 13, 1966.
[4] Appointed July 12, 1966; resigned December 20, 1966 upon appointment as Associate Judge of the Circuit Court for Baltimore County.
[5] Appointed July 12, 1966.
[6] Resigned September 10, 1965 upon appointment as Associate Judge of the Court of Appeals of Maryland.
[7] Appointed September 17, 1965; resigned August 2, 1966 upon appointment as Associate Judge of the Circuit Court for Anne Arundel County.
[8] Appointed September 6, 1966.
[9] Resigned July 12, 1966 upon appointment as Associate Judge of the Supreme Bench of Baltimore City.
[10] Appointed July 12, 1966.

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700 Mercantile Trust Building
Baltimore, Maryland 21202

COMMISSION REPORTERS

LEWIS D. ASPER
Committee on Elective Franchise and Declaration of Rights

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STEPHEN H. SACHS
Committee on State Finance and Taxation

* * * * *

MRS. RONALD H. FISHBEIN
Editorial Assistant on Interim Report

* * * * *

CONSULTANTS TO THE COMMISSION

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DANIEL R. THOMPSON
JOHN P. WHEELER, JR.
CLINTON IVAN WINSLOW
GLENN R. WINTERS

[1] Resigned September 12, 1966 upon appointment as United States District Judge.

STATE OF MARYLAND
CONSTITUTIONAL CONVENTION COMMISSION
700 MERCANTILE TRUST BUILDING BALTIMORE, MARYLAND 21202
Area Code 301 752-4951

May 26, 1967.

To His Excellency, Spiro T. Agnew, *Governor of Maryland:*
To the Honorable, The General Assembly of Maryland:
To the People of Maryland:

On June 16, 1965, Governor J. Millard Tawes established the Constitutional Convention Commission by executive order and appointed twenty-seven citizens of Maryland to its membership. The Governor charged the Commission with the responsibility for studying the present Constitution to ascertain if modification or revision was necessary, whether a constitutional convention should be held, and to prepare specific recommendations with respect to such revision and the holding of a constitutional convention.

After its initial review of the present Constitution, the Commission advised Governor Tawes in September, 1965, that in its opinion a complete revision of the Constitution was urgently desirable and necessary and that this should be accomplished through the convening of a constitutional convention, composed of elected delegates representing every part of the State.

At the request of Governor Tawes, the Commission drafted and submitted to the 1966 session of the General Assembly legislation calling for the taking of "the sense of the people" as to whether there should be a constitutional convention. This legislation, Chapter 501 of the Acts of 1966, and complementing legislation which called for a constitutional convention to convene September 12, 1967, Chapter 500 of the Acts of 1966, were enacted by the General Assembly and were signed into law by Governor Tawes.

In the referendum to take "the sense of the people" held on September 13, 1966, the electorate voted 160,280 to 31,680 for the convening of a convention. Upon this overwhelming endorsement of the call of the convention, the Commission drafted a detailed Convention Enabling Act for introduction in the 1967 session of the General Assembly. This Enabling Act, with some modification, was enacted by the General Assembly on March 20, 1967, and signed into law by Governor Spiro T. Agnew on March 24, 1967. This Enabling Act prescribes the procedures by which 142 delegates are to be elected to the Convention on June 13, 1967, and specifies their qualifications. It also prescribes some of the procedures to be followed by the convention.

In the period of nearly two years since its appointment, the Commission and its Committees have conducted numerous hearings, pursued many studies and held many meetings, all of which have been public. During the course of these hearings and meetings, the Commission has prepared specific proposals for the consideration

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of the Constitutional Convention which have been embodied in a draft constitution. These specific proposals and recommendations were announced publicly by the Commission and discussed publicly in the press and other news media between October, 1965, when the first committee report was published and December, 1966, when the last formal meeting of the Commission to consider its recommendations was held.

Since that time, the recommendations embodied in the draft constitution have undergone complete revision in style and arrangement, and an extensive commentary has been prepared. Both of these will be included in the final report of the Commission now in process of preparation.

The primary part of this report will be a volume in which the Commission outlines its objectives, methods of procedure, and basic guiding principles; summarizes the history of Maryland's prior constitutions and constitutional conventions; sets forth its draft constitution and the accompanying commentary; compares the draft constitution with the present Constitution; presents a draft of recommended rules for the Convention; and, in an appendix, reprints a collection of documents relevant to the calling of the 1967 Constitutional Convention. The Commission also plans to publish in a separate volume the research monographs which were prepared for it during its twenty months of work and the text of former state constitutions, a volume of edited transcripts of hearings which it held, and a volume of edited proceedings of the Commission.

Because of the special public interest in the Commission's basic recommendations in the draft constitution and commentary during the campaign for election of delegates to the Convention, the Commission is publishing in advance this excerpt from its principal report (chapters 3 and 4, here marked 1 and 2) for general distribution at this time even though it is incomplete in a few respects. The principal items not yet completed are the preamble and the schedule of transitional provisions. These will be included with the draft constitution in the Commission's final report.

It is anticipated that the completed volume 1 of the Commission's full report will be published by the end of June, 1967; the remaining three volumes will be published during the summer.

Respectfully submitted,

The Constitutional Convention Commission

H. Vernon Eney

Chairman

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I

Draft Constitution

ARTICLE I. DECLARATION OF RIGHTS

Section 1.01. **Purpose of Government.**

All political power originates in the people and all government is instituted for their liberty, security, benefit and protection.

Section 1.02. **Freedom of Expression.**

The people shall have the right peaceably to assemble and to petition the government for the redress of grievances. Freedom of the press and freedom of speech shall not be abridged, each person remaining responsible for abuse of those rights.

Section 1.03. **Freedom of Religion.**

No law shall be enacted respecting an establishment of religion. Every person shall have the right to worship or not to worship as he thinks most acceptable, and no person shall be disqualified from holding public office or be rendered incompetent as a witness or juror because of his opinion on matters of religious belief.

Section 1.04. **Due Process.**

No person shall be deprived of life, liberty or property without due process of law, or be denied the equal protection of the laws, or be subject to discrimination by law or other governmental action because of religion, race, color, or national origin.

Section 1.05. **Eminent Domain.**

Private property shall not be taken for public use without just compensation.

Section 1.06. **Jury Trial in Civil Cases.**

Every person shall have the right of trial by jury of issues of fact in civil proceedings at law in the courts of this State in which the amount or value in controversy exceeds such minimum as may be fixed by law.

Section 1.07. **Legal Limitations.**

No bill of attainder, or *ex post facto* law, or law impairing the obligation of contracts shall be enacted, nor shall any conviction of crime work corruption of blood or forfeiture of estate.

Section 1.08. **Search and Seizure.**

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and in their oral or other communications against unreasonable interceptions shall not be violated. No search warrant shall be issued except upon probable cause supported by oath or affirmation, and the place to be searched, the persons or things to be seized, or the communications sought to be intercepted shall be particularly described in the warrant.

Section 1.09. **Rights of Accused.**

A person accused of crime shall have the right to be informed of the charge against him in time to prepare his defense, to have the assistance of counsel in his defense, to be confronted with and to examine under oath or affirmation the witnesses against him, to have compulsory process for obtaining witnesses and to have a speedy and public trial in the jurisdiction where the crime is alleged to have been committed and before an impartial jury, without whose unanimous consent he shall not be adjudged guilty.

Section 1.10. **Double Jeopardy; Self-Incrimination.**

No person shall be twice put in jeopardy of criminal punishment for the same offense or be compelled in any criminal case to be a witness against himself.

Section 1.11. **Unusual Punishment.**

Excessive bail shall not be required. Neither excessive fines nor cruel and unusual punishment shall be provided by law or be imposed by the courts.

Section 1.12. **Habeas Corpus.**

The privilege of the writ of habeas corpus shall not be suspended and the provisions of this Constitution shall apply both in time of war and in time of peace.

Section 1.13. **Reserved Rights.**

This enumeration of rights shall not be construed to impair or deny others retained by the people.

ARTICLE II. SUFFRAGE AND ELECTIONS

VOTERS

Section 2.01. **Eligible Voters.**

Every citizen of the United States who has attained the age of twenty-one years, who has been a resident of this State for six months and of the House of Delegates district in which he offers to vote for three months next preceding an election, and

who is registered to vote, shall be qualified to vote at such election for all officers to be elected by the people and upon all questions submitted to a vote of the people. Removal from one house district to another in this State shall not deprive a person of his qualification to vote in the house district from which he has removed until three months after his removal.

Section 2.02. **Eligible Voters in Presidential Elections.**

A person who has been a resident of this State less than six months next preceding an election, but who is otherwise eligible to vote under this Article, may vote for President and Vice President of the United States or presidential electors in that election.

Section 2.03. **Voters in United States Enclaves.**

A person shall not be deemed ineligible to vote in national or state elections solely by reason of the fact that he resides on land over which the United States exercises exclusive jurisdiction.

Section 2.04. **Disqualification.**

The General Assembly shall by law establish disqualifications for voting by reason of mental incompetence or conviction of serious crime, and may provide for the removal of such disqualifications.

ELECTIONS

Section 2.05. **Election Procedure.**

The General Assembly shall by law define residence, establish a uniform system of permanent registration of voters, provide for the nomination of candidates, regulate the time, place and manner of elections, provide for the administration of elections and for absentee voting, insure secrecy of voting and protect the integrity of the election process.

Section 2.06. **General Elections.**

A general election shall be held on the Tuesday following the first Monday in November in the year 1970, and on the same day every even year thereafter. The candidates receiving the highest number of votes shall be elected to the offices for which they were candidates.

Section 2.07. **Local Elections.**

Voting qualifications for local elections shall be as provided in Section 2.01 of this Article except that a municipal corporation may establish a period of minimum residence not exceeding one year and may extend the right to vote to nonresidents owning taxable property within its limits.

REFERENDUM

Section 2.08. **Right of Referendum.**

If, within sixty days from the date on which a bill becomes law, a petition is filed with the office of the governor to refer the law to a vote of the people, the

law shall be submitted to a vote at the next general election. If rejected by a majority of those voting on the question, the law shall stand repealed thirty days thereafter. If the petition is filed before the date on which the law is to take effect, then, unless the law is one passed by the affirmative vote of three-fifths of all the members of each house of the General Assembly, it shall not take effect until thirty days after its approval by a majority of those voting on the question in the election.

Section 2.09. **Referendum Petition.**

A petition shall be sufficient to refer a law, or any part thereof, to a vote of the people if signed by a number of qualified voters equal to five per cent of the total number of votes cast for governor in the most recent gubernatorial election, provided that not more than one-half of such required number shall be voters residing in any one county.

Section 2.10. **Referendum Restrictions.**

No plan for legislative districting or apportionment or congressional districting, no law imposing a tax and no law making an appropriation for maintaining the state government or for aiding or maintaining any public institution shall be subject to referendum.

ARTICLE III. LEGISLATIVE BRANCH

Section 3.01. **Legislative Power.**

The legislative power of the State is vested in the General Assembly, which shall consist of two houses, the Senate and the House of Delegates.

DISTRICTS

Section 3.02. **Legislative Districts.**

The State shall be divided by law into districts for the election of members of the Senate and into districts for the election of members of the House of Delegates. Each district shall consist of compact and adjoining territory, and the ratio of the number of legislators in each district to the population of such district shall be as nearly equal as practicable.

Section 3.03. **Redistricting.**

Within three months after official publication of the population figures of each decennial census of the United States, the governor shall present to the General Assembly plans of congressional districting and legislative districting and apportionment. If the General Assembly is not in session, the governor shall convene a special session. The General Assembly shall by law enact plans of congressional districting and legislative districting and apportionment. If no plan has been enacted for any one or more of these purposes within four months prior to the final date for the filing of candidates for the next general election occurring after publication of such census figures, then the pertinent plan as presented to the General Assembly by the governor shall become law. Upon petition of any qualified voter, the Supreme Court shall have original jurisdiction to review

the congressional districting and legislative districting and apportionment of the State and grant appropriate relief, if it finds that any of them does not fulfill constitutional requirements.

Section 3.04. **District Representation.**

At least one senator, but not more than two senators, shall represent each senatorial district. At least one delegate, but not more than six delegates, shall represent each house district.

LEGISLATORS

Section 3.05. **Qualifications of Legislators.**

To be eligible as a senator or delegate, a person shall be a qualified voter of the State of Maryland at the time of his election or appointment, and shall have been a resident of the State for at least two years immediately preceding his election or appointment. To be eligible as a senator, a person shall have attained the age of twenty-five years, and, to be eligible as a delegate, he shall have attained the age of twenty-one years, at the time of his election or appointment.

Section 3.06. **Election of Legislators.**

A member of the General Assembly shall be elected by the qualified voters of the legislative district from which he seeks election, to serve for a term of four years beginning on the third Wednesday of January following his election.

Section 3.07. **Vacancies.**

A vacancy in the General Assembly shall be filled by appointment by the governor; provided that the appointee to succeed a party member shall be a member of the same party. The person appointed to fill the vacancy shall serve only until the next general election held more than ninety days after the vacancy occurs, at which election any remaining portion of the unexpired term shall be filled.

Section 3.08. **Compensation of Legislators.**

The members of the General Assembly shall receive such salary and allowances as may be prescribed by law.

Section 3.09. **Appointment of Legislators to Other Offices.**

No member of the General Assembly shall, during the term of office for which he was elected or appointed, be appointed to any office which shall have been created, or the salary or profits of which shall have been increased, by the General Assembly during such term.

Section 3.10. **Immunity of Legislators.**

A member of the General Assembly shall not be liable in any civil action or criminal prosecution for any words used in any proceedings of the General Assembly.

GENERAL ASSEMBLY

Section 3.11. **Size of General Assembly.**

The number of members of each house of the General Assembly shall be as prescribed by law.

Section 3.12. **Legislative Sessions.**

The General Assembly shall convene in regular session on the third Wednesday of January of each year, unless otherwise prescribed by law, and may continue in session for a period not longer than seventy days; provided, however, that by the affirmative vote of three-fifths of all the members of each house a session may be extended for a period not longer than thirty days. The governor may convene a special session of the General Assembly at any time and must convene a special session upon the written request of three-fifths of all the members of each house.

Section 3.13. **Organization of General Assembly.**

Each house shall be the judge of the qualifications and selection of its members, as prescribed by this Constitution and the laws of this State. Each house shall elect its own officers and determine its rules of procedure, and may permit its committees to meet between sessions of the General Assembly. Each house may, by the affirmative vote of three-fifths of all its members, compel the attendance and testimony of witnesses and the production of records and papers either before the house as a whole or before any of its committees, provided that the rights and the records and papers of all witnesses, in such cases, shall have been protected by law. No person's right to fair and just treatment in the course of legislative and executive investigations shall be infringed. Each house may punish a member for disorderly or disrespectful behavior and may expel a member by the affirmative vote of three-fifths of all its members.

Section 3.14. **Quorum.**

A majority of all the members of each house shall constitute a quorum for the transaction of business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner, and under such penalties, as each house may prescribe.

LEGISLATION

Section 3.15. **Form of Laws.**

The style of every law of this State shall be, "Be it enacted by the General Assembly of Maryland"; and the General Assembly shall enact no law except by bill. Every law enacted by the General Assembly shall embrace only one subject, which shall be described in its title. No law, nor section of law, shall be revived or amended by reference to its title or section only; nor shall any law be construed by reason of its title, to grant powers or confer rights which are not expressly contained in the body of the act. It shall be the duty of the General Assembly, in amending any article or section of the code or law of this State, to enact the article, section or law as it would read when amended.

Section 3.16. **Consideration of Bills.**

A bill may originate in either house of the General Assembly and be altered, amended, passed, or rejected by the other. Except during the first two days of a special session, no vote on final passage of a bill shall be taken until the bill shall have been printed in final form nor until the third calendar day after introduction.

Section 3.17. **Journal and Passage of Bills.**

Each house shall keep a current, daily journal of its proceedings which shall be open to public inspection at all times and shall be published as soon as practicable. No bill shall be enacted nor shall a resolution requiring the action of both houses be adopted, unless it is passed in each house by a majority of all the members of that house. A vote in joint session or by either house on any bill or resolution shall be taken only in public session. On final passage of a bill, including a bill proposing a constitutional amendment, or a resolution, the vote cast by each member shall be recorded in the journal of the house of which he is a member.

ARTICLE IV. EXECUTIVE BRANCH

Section 4.01. **Executive Power.**

The executive power of the State is vested in the governor, who shall be responsible for the faithful execution of the laws.

Section 4.02. **Duties of Lieutenant Governor.**

There shall be a lieutenant governor who shall perform such duties as may be prescribed by law and such other duties as may be delegated to him by the governor.

GOVERNOR AND LIEUTENANT GOVERNOR

Section 4.03. **Governor.**

To be eligible for election as governor, a person shall have attained the age of thirty years at the time of his election, and shall have been a qualified voter in the State for at least two years immediately preceding his election. No person elected governor for two full consecutive terms shall be eligible to hold that office again until one full term has intervened.

Section 4.04. **Lieutenant Governor.**

To be eligible for election as lieutenant governor, a person shall have attained the age of thirty years at the time of his election, and shall have been a qualified voter in the State at least two years immediately preceding his election. No person elected governor for two consecutive terms shall be eligible to hold the office of lieutenant governor until one full term has intervened.

Section 4.05. **Election of Governor and Lieutenant Governor.**

The governor shall be elected to serve for a term of four years beginning on the third Wednesday of January following his election. In the event of a tie

vote, the governor shall be elected from the candidates having received the tie vote by the affirmative vote in joint session of a majority of the combined membership of both houses as the first order of business after their organization. Each candidate for lieutenant governor shall run jointly in the general election with a candidate for governor and the votes cast for one shall be considered as cast also for the other. The candidate for lieutenant governor whose name appears on the ballot jointly with that of the successful candidate for governor shall be elected lieutenant governor.

GUBERNATORIAL SUCCESSION

Section 4.06. **Failure of Governor to Take Office.**

When the governor-elect is disqualified, resigns or dies following his election, but prior to taking office, the lieutenant governor-elect shall succeed to the office of governor for the full term. When the governor-elect fails to assume office for any other reason, the lieutenant governor-elect shall serve as acting governor, but if the governor-elect does not assume office within the first six months of the term, the office of governor shall be vacant.

Section 4.07. **Lieutenant Governor as Acting Governor.**

When the governor notifies the lieutenant governor in writing that he will be temporarily unable to carry out the duties of his office or when the governor is disabled and thereby unable to communicate such inability to the lieutenant governor, the lieutenant governor shall serve as acting governor until the governor notifies the lieutenant governor in writing that he is able to carry out the duties of his office. If the governor does not notify the lieutenant governor in writing that he is able to carry out the duties of his office within six months from the time the lieutenant governor begins serving as acting governor, the office of governor shall be vacant.

Section 4.08. **Legislative Determination of Disability.**

The General Assembly may, by the affirmative vote in joint session of three-fifths of the combined membership of both houses, pass a resolution stating that the governor is unable to carry out the duties of his office by reason of a physical or mental disability. Upon the written request of a majority of the members of each house the General Assembly shall be convened by the presiding officers of both houses to determine whether such a resolution should be passed. If the General Assembly passes such a resolution, it shall be delivered to the Supreme Court which shall then have exclusive jurisdiction to determine whether the governor is unable to discharge the duties of his office by reason of a disability. If the Supreme Court determines that the governor is unable to discharge the duties of his office by reason of a disability, the office shall be vacant.

Section 4.09. **Judicial Determination of Vacancy.**

The Supreme Court shall have exclusive jurisdiction to determine the existence of a vacancy under this Constitution in the offices of governor and lieutenant governor and all questions arising under this Article concerning the right to office or the exercise of the powers thereof.

Section 4.10. **Succession to Office of Governor.**

When a vacancy occurs in the office of governor, the lieutenant governor shall succeed to the office of governor for the unexpired term. If a vacancy exists in the office of lieutenant governor when the lieutenant governor is to succeed to the office of governor or to serve as acting governor, the president of the Senate shall succeed to the office of governor for the unexpired term or serve as acting governor. If a vacancy exists in the office of president of the Senate when the president of the Senate is to succeed to the office of governor or to serve as acting governor, the Senate shall convene and fill the vacancy.

Section 4.11. **Powers and Duties of Successor.**

When the lieutenant governor or the president of the Senate succeeds to the office of governor, he shall have the title, powers, duties and emoluments of the office; but when the lieutenant governor or the president of the Senate serves as acting governor, he shall have only the powers and duties of the office. When the president of the Senate serves as acting governor, he shall continue to be president of the Senate; but during his service as acting governor, his duties as president shall be performed by such person as the Senate shall select.

LEGISLATIVE RESPONSIBILITIES OF GOVERNOR

Section 4.12. **Messages to General Assembly.**

The governor shall inform the General Assembly of the condition of the State and may recommend measures he considers necessary or desirable.

Section 4.13. **Convening General Assembly.**

The governor may, on extraordinary occasions, convene the General Assembly or the Senate alone by proclamation, stating the purpose for which he has convened it.

Section 4.14. **Veto by Governor.**

All bills passed by the General Assembly shall be subject to veto by the governor, except budget bills and bills proposing amendments to the Constitution.

Section 4.15. **Item Veto.**

The governor may strike out or reduce any item in a supplementary appropriation bill and the procedure in such a case shall be the same as in the case of the veto of a bill by the governor.

Section 4.16. **Presentation of Bills to Governor.**

A bill subject to veto by the governor shall be presented to him within seven days after its final passage by the General Assembly. If the General Assembly is in session, the bill shall become law if the governor signs or fails to veto it within ten days of presentation. If the General Assembly adjourns *sine die* before presentation or during such ten-day period, the bill shall become law if the governor signs or fails to veto it within forty-five days of presentation.

Section 4.17. **Return of Vetoed Bills.**

When the governor vetoes a bill, he shall return it to the General Assembly within ten days of presentation if the General Assembly is in session. A bill that is returned by the governor may be reconsidered by the General Assembly; and if, upon reconsideration, the bill is passed by the affirmative vote of three-fifths of all the members of each house, it shall become law.

ADMINISTRATIVE ORGANIZATION

Section 4.18. **Organization of Principal Departments.**

All offices, agencies and instrumentalities of the legislative and executive branches of the state government exercising executive and administrative functions, powers or duties shall be allocated by law among and within principal departments. Regulatory and quasi-judicial agencies shall be assigned by law to either the legislative or executive branch and may, but need not, be established within a principal department. The head of each principal department shall be either a single executive or a board or commission. When a board or commission is at the head of a principal department, a chief administrative officer may be provided for it by law.

Section 4.19. **Reorganization of Principal Departments.**

The functions, powers and duties of the principal departments and of the agencies of the State within the legislative and executive branches shall be prescribed by law. The governor may reallocate the functions, powers and duties of the principal departments and of the agencies within the executive branch for efficient administration. Proposed changes in the allocations prescribed by law shall be set forth in executive orders which shall be submitted to the General Assembly within the first ten days of a regular session. A proposed change which is approved, or which is not specifically disapproved or modified by the General Assembly within fifty days after submission, shall become effective on a date designated by the governor and thereafter have the force of law.

Section 4.20. **Appointment and Removal of Administrative Officers.**

The governor shall appoint each executive serving as the head of a principal department and each chief administrative officer serving under a board or commission which is the head of a principal department, except the head or chief administrative officer of an institution of higher education, of the state public school system, or of a principal department within the legislative or judicial branches. Each gubernatorial appointee shall have the professional qualifications which may be prescribed by law and shall serve at the pleasure of the governor.

Section 4.21. **Appointment and Removal of Administrative Boards and Commissions.**

The members of each board or commission which serves as the head of a principal department, except the governing board of an institution of higher education, shall be appointed by the governor and their terms of office shall be

prescribed by law in such manner that the governor, upon taking office following his election, shall be able forthwith to appoint at least one-half of them. Such members may be removed as prescribed by law.

Section 4.22. **Appointments and Removals Prescribed by Law.**

The members of the governing board of an institution of higher education, the head or chief administrative officer of an institution of higher education, of the state public school system, or of a principal department within the legislative or judicial branches, and the members of a regulatory or quasi-judicial agency which does not serve as the head of a principal department, shall be appointed and may be removed as prescribed by law.

Section 4.23. **Information from Administrative Officers.**

The governor may at any time require information, in writing or otherwise, from any officer of any executive or administrative department, office, or agency upon any subject relating to that department, office, or agency.

CLEMENCY

Section 4.24. **Executive Clemency.**

The governor shall have power to grant reprieves and pardons, except in cases of conviction upon impeachment, and to remit fines and forfeitures for offenses against the State. He shall report to the General Assembly in writing, at least annually, of the instances of the exercise of this power.

ARTICLE V. JUDICIAL BRANCH

Section 5.01. **Judicial Power.**

The judicial power of the State is vested exclusively in a unified judicial system composed of the Supreme Court, the Appellate Court, the Superior Court and the District Court.

THE SUPREME COURT

Section 5.02. **Jurisdiction of Supreme Court.**

The Supreme Court shall be the highest court of the State and shall have the jurisdiction prescribed by law.

Section 5.03. **Composition of Supreme Court.**

The Supreme Court shall be composed of seven justices. Five justices shall constitute a quorum, and the concurrence of four shall be necessary for the decision of a case.

Section 5.04. **Chief Justice.**

The governor shall designate one of the justices of the Supreme Court to be chief justice for the remainder of his service on the court, or until he resigns the office of chief justice. During a vacancy in the office of chief justice, or

during a period, as determined by the Supreme Court, when the chief justice is unable to serve, the associate justice senior in service on the Supreme Court shall have the powers and duties of the office of chief justice.

THE APPELLATE COURT

Section 5.05. **Jurisdiction of Appellate Court.**

The Appellate Court shall have the jurisdiction prescribed by law.

Section 5.06. **Composition of Appellate Court.**

The Appellate Court shall be composed of no fewer than five judges, as prescribed by law. The Appellate Court may sit in panels of no fewer than three judges in each case, as prescribed by rule.

THE SUPERIOR COURT

Section 5.07. **Jurisdiction of Superior Court.**

The Superior Court shall have original jurisdiction in all judicial proceedings, except as otherwise prescribed by this Constitution or by law, and shall have such other jurisdiction as is prescribed by law. Jurisdiction of the Superior Court shall be uniform throughout the State.

Section 5.08. **Composition of Superior Court.**

The Superior Court shall be composed of the number of judges prescribed by law and the number shall be allocated among the counties by law. There shall be at least one Superior Court judge resident in each county.

THE DISTRICT COURT

Section 5.09. **Jurisdiction of District Court.**

The District Court shall have the original jurisdiction prescribed by law. Jurisdiction of the District Court shall be uniform throughout the State.

Section 5.10. **Composition of District Court.**

The District Court shall be composed of the number of judges prescribed by law. The State shall be divided by law into districts. Each district shall be composed of one or more entire and adjoining counties. There shall be at least one District Court judge resident in each district.

Section 5.11. **Commissioners.**

There may be commissioners of the District Court in the number and with the qualifications prescribed by rule. Commissioners in a district shall be appointed by and serve at the pleasure of that judge of the District Court who shall be designated by rule to appoint commissioners therein. Commissioners may exercise powers only with respect to arrest, bail, collateral and incarceration pending hearing, and then only as may be prescribed by rule.

SELECTION, TENURE AND REMOVAL OF JUDGES

Section 5.12. **Judicial Circuits.**

The State shall be divided by law into circuits of the Supreme Court and into circuits of the Appellate Court.

Section 5.13. **Eligibility for Appointment as Judge.**

To be eligible for nomination and appointment as judge, a person shall be a citizen of the State and shall have been a member of the bar of the State for at least five years immediately prior to his nomination, and shall be a resident of the circuit where the Supreme Court or the Appellate Court vacancy exists, a resident of the district where the District Court vacancy exists, or a resident of, or have his principal office for the practice of law in, the county where the Superior Court vacancy exists.

Section 5.14. **Nomination and Appointment.**

A vacancy in the office of judge shall be filled by the governor from a list of no fewer than two nor more than five eligible persons nominated by a judicial nominating commission. The commission shall make nominations to fill a vacancy not more than thirty days prior to nor more than sixty days after the occurrence of the vacancy. If the governor fails to make the appointment within sixty days after receiving the list of nominees, his power to make the appointment shall end and the chief justice of the Supreme Court shall appoint one of the nominees.

Section 5.15. **Appellate Courts Nominating Commission.**

Nominations to fill a vacancy on the Supreme Court or on the Appellate Court shall be made by the Appellate Courts Nominating Commission. The commission shall be composed of six lay persons, six lawyers, and the chief justice of the Supreme Court. The terms of the non-judicial members shall be four years.

Section 5.16. **Trial Courts Nominating Commission.**

Nominations to fill a vacancy on the Superior Court and on the District Court shall be made by a trial courts nominating commission. The number and composition of trial courts nominating commissions and the terms of their members shall be prescribed by law, but each commission shall have no fewer than five members and shall be composed of an equal number of lay and lawyer members, and a judge. Each commission shall make nominations to fill vacancies on the Superior Court in one or more counties, or on the District Court in one or more districts, or both, as prescribed by law.

Section 5.17. **Lawyer Members of Nominating Commission.**

Lawyer members of the Appellate Courts Nominating Commission shall be elected by lawyers throughout the State. Lawyer members of each trial courts nominating commission shall be elected by the lawyers of the area for which

such commission is established. Eligibility and elections of lawyer members of nominating commissions and eligibility of their electors shall be governed by rule.

Section 5.18. **Lay Members of Nominating Commission.**

Lay members of the Appellate Courts Nominating Commission shall be appointed by the governor from the qualified voters of the State. Lay members of each trial courts nominating commission shall be appointed by the governor from the qualified voters of the area for which such commission is established.

Section 5.19. **Judicial Member of Nominating Commission.**

The judicial member of a trial courts nominating commission shall be selected in the manner prescribed by law.

Section 5.20. **Rules Governing Nominating Commission.**

A nominating commission may act only upon the concurrence of a majority of its members. Each commission shall elect one of its members as chairman. A non-judicial member of a commission may not hold any state or local public office of profit or office in a political party while a member of a commission and for six months thereafter. A member of a commission shall receive no compensation for his service.

Section 5.21. **Term of Office of Judge.**

At the next general election following the expiration of two years from the date of appointment, and every ten years thereafter so long as he retains his office, each judge shall be subject to approval or rejection by the electorate. Each justice of the Supreme Court and each judge of the Appellate Court shall be subject to approval or rejection by the electorate of the entire State. Each judge of the Superior Court and of the District Court shall be subject to approval or rejection by the electorate of the county or district, respectively, for which the office then exists. Provision may be made by rule for the taking of a poll of the lawyers of the area in which the judge is required to stand for election as to whether he should be retained in office for a full or additional term, and for publication of the results thereof. In the event of the rejection of a judge by the electorate, the office shall be vacant.

Section 5.22. **Retirement of Judge.**

Each judge shall retire at the age of seventy. The chief justice of the Supreme Court, with the approval of a majority of the members of that court, may authorize a retired judge temporarily to perform judicial duties in any court.

Section 5.23. **Compensation of Judge.**

Each judge shall be compensated for his judicial service solely by the State and his salary shall not be reduced during his continuance in office. A pension payable to a retired judge or his surviving spouse pursuant to provisions in effect during his continuance in office shall not be reduced. All judges of the

same court shall be paid the same compensation, including any pension based upon length of service, except that a uniform reduction in compensation may be made applicable to all judges of the same court appointed after the effective date of the reduction.

Section 5.24. **Restriction of Non-Judicial Activities.**

No judge shall engage in the practice of law, or run for elective office other than the judicial office he then holds, or make any contribution to or hold any office in a political party or organization, or take part in any partisan political campaign, or receive any remuneration for his judicial service except as provided herein. No retired judge while engaging in such activities shall be paid any pension for his judicial service.

Section 5.25. **Removal of Judge.**

The Supreme Court shall have power, after hearing, to remove any judge from office upon a finding of misconduct in office or persistent failure to perform the duties of his office, or to retire any judge upon a finding of disability seriously interfering with the performance of his duties which is, or is likely to become, of a permanent character. A justice shall not sit in any hearing involving his own removal or retirement. Implementation and enforcement of this section may be by rule or order of the Supreme Court. A judge retired under this section shall have the rights and privileges prescribed by law for other retired judges. A judge removed under this section, and his surviving spouse, shall have the rights and privileges accruing from his judicial service only to the extent prescribed by the order of removal.

ADMINISTRATION

Section 5.26. **Administrative Functions of Chief Justice.**

The chief justice of the Supreme Court shall be the administrative head of the judicial system. He shall designate one Appellate Court judge, one Superior Court judge and one District Court judge as chief judges of their respective courts. Each shall serve as chief judge at the pleasure of the chief justice. The chief justice shall have the power to assign any judge to sit temporarily in any court.

Section 5.27. **Administrative Functions of Chief Judges.**

The chief judge of the Appellate Court shall assist the chief justice in the administration of the Appellate Court. The chief judge of the Superior Court shall assist the chief justice in the administration of the judicial system and shall perform such duties in connection therewith as are assigned him by the chief justice. The chief judge of the District Court shall assist the chief judge of the Superior Court in the administration of the District Court.

Section 5.28. **Clerks of Court.**

The chief justice of the Supreme Court and the chief judges of the Appellate, Superior and District courts shall each appoint a chief clerk of his court who

shall serve at the pleasure of the appointing judge. There shall be a clerk of the Superior Court in each county and of the District Court in each district. Their appointment and terms shall be governed by rule.

Section 5.29. **Rule-Making Power.**

Except as to matters specifically provided to be prescribed by rule, the Supreme Court by rule and the General Assembly by law shall have concurrent power to prescribe regulations governing practice and procedure in all courts, governing the admission of persons to practice law in this State and the discipline of persons so admitted, and governing administration of the courts, officers of the judicial branch and officers of the executive branch, to the extent that their duties directly relate to the enforcement of judicial orders. In the event a rule and a law prescribing a regulation of any of the three foregoing classes conflict, the rule, if adopted or readopted after the enactment of the law, shall take precedence over the prior law to the extent of the conflict. "Rule" as used in this Article means a rule adopted by the Supreme Court.

ARTICLE VI. STATE FINANCES

STATE DEBTS AND GIFTS

Section 6.01. **State Indebtedness.**

The State shall have the power to incur indebtedness for any public purpose in the manner and upon the terms and conditions as the General Assembly may prescribe by law. All such indebtedness shall be secured by an irrevocable pledge of the full faith and credit and unlimited taxing power of the State. Unless the law authorizing the creation of an obligation includes such an irrevocable pledge, the obligation shall not be considered an indebtedness of the State. If at any time the General Assembly shall fail to appropriate sufficient funds to provide for the timely payment of the interest upon and installments of principal of all state indebtedness, there shall be set apart from the first revenues thereafter received applicable to the general funds of the State a sum sufficient to pay such interest and installments of principal. All state indebtedness shall mature within twenty-five years from the time when such indebtedness is incurred.

Section 6.02. **Gift or Loan of Assets or Credit.**

The assets or credit of the State shall not in any manner be given or loaned to any individual, association, or corporation unless a public purpose will be served thereby and unless authorized by an act of the General Assembly stating the public purpose and, in the case of a gift or loan of credit or a loan of assets, passed by the affirmative vote of three-fifths of all the members of each house.

BUDGET AND APPROPRIATIONS

Section 6.03. **Appropriations.**

The General Assembly may not appropriate any money out of the treasury except by a budget bill or a supplementary appropriation bill.

Section 6.04. **The Budget.**

On the third Wednesday in January in each year (except in the case of a newly elected governor, and then not later than twelve days after the convening of the General Assembly into regular session), unless such time be extended by the General Assembly, the governor shall submit to the General Assembly a budget for the ensuing fiscal year. The budget shall show the estimated surplus or deficit of revenues at the end of the preceding year and shall contain, for the fiscal year covered thereby, an estimate of revenues, a complete plan of proposed expenditures by program including all appropriations required by this Constitution or by law, and any additional information prescribed by law, all in such form and detail as the governor shall determine. The total of the proposed expenditures shall be limited to funds available therefor as shown in the budget.

Section 6.05. **Mandatory Appropriations.**

The estimates of appropriations for the legislative branch, certified by the presiding officer of each house, and for the judicial branch, certified by the chief judge of the Superior Court, shall be transmitted to the governor, in such form and at such time as he shall direct. To the extent that appropriations for the legislative and judicial branches and for state support of public school systems are required by law, the estimates therefor shall be included in the budget without revision.

Section 6.06. **Presentation of Budget Bill.**

The governor shall deliver to the presiding officer of each house the budget and a bill for all the proposed appropriations of the budget, classified and in such form and detail as he shall determine or as may be prescribed by law. The presiding officer of each house shall promptly cause the bill, called the budget bill, to be introduced. The governor may, before final action thereon by the General Assembly, amend or supplement the budget bill to correct an oversight, to appropriate funds contingent on passage of pending legislation or to provide for an emergency. Such amendment or supplement shall be delivered to the presiding officers of both houses, and it shall thereafter become a part of the budget bill as an addition, substitute or modification thereof or any item thereof. Each amendment shall be accompanied by a statement by the governor explaining the reasons therefor.

Section 6.07. **Amendment of Budget Bill.**

The General Assembly may amend the budget bill by increasing any item relating to the legislative or judicial branches, or by reducing or striking out any item except the appropriation of sufficient funds to provide for the timely payment of the interest upon and installments of principal of all state indebtedness and the appropriations required by law for state support of public school systems; but it may not otherwise amend the budget bill or change the estimate of revenues. The compensation of a public officer may not be decreased during his term of office.

Section 6.08. **Enactment of Budget Bill.**

The budget bill shall become law when passed by both houses of the General Assembly and shall not be subject to veto by the governor. If the budget bill has not been enacted within fifty days after its introduction, it shall become law in the form in which it was introduced and any amendment or supplement thereto shall be treated as a supplementary appropriation bill.

Section 6.09. **Testimony on Budget Bill.**

Either house of the General Assembly may require any person in any branch or agency of the state government, other than the governor, to appear and testify with respect to the budget bill or a supplementary appropriation bill. The governor or a person designated by him shall have the right to appear and testify with respect to the budget bill or a supplementary appropriation bill.

Section 6.10. **Supplementary Appropriations.**

Any other appropriation shall be embodied in a separate bill, called a supplementary appropriation bill, which shall be limited to some single work, object or purpose clearly defined therein. A supplementary appropriation bill may not be considered by either house until the budget bill has become law, but may be considered and enacted thereafter in a regular session or at any time in a special session. A supplementary appropriation bill shall provide the revenue necessary to pay the appropriation by a tax, direct or indirect, to be levied and collected as prescribed therein, or in the case of a budget bill amendment or supplement which has not become law by funds available therefor in conformity with the estimate of revenues contained in the budget or any supplement thereto.

ARTICLE VII. LOCAL GOVERNMENT

Section 7.01. **Units of Local Government.**

For the purposes of this Constitution, Baltimore City shall be considered a county; "municipal corporation" shall mean an incorporated city, town or village, but shall not include Baltimore City or any county; "region" shall mean an area comprising all or parts of two or more counties.

Section 7.02. **Establishment of Counties and Multi-County Governmental Units.**

The General Assembly may provide by law for the establishment, incorporation, change, merger, dissolution and alteration of boundaries of counties and multi-county governmental units, including intergovernmental authorities and popularly elected regional representative governments, but excluding municipal corporations. A law altering the boundaries of a county shall be enacted only by the affirmative vote of at least three-fifths of all the members of each house.

REGIONAL GOVERNMENTS AND INTERGOVERNMENTAL AUTHORITIES

Section 7.03. **Establishment of Regional Governments.**

Upon the establishment by the General Assembly by law of the boundaries of a region, a popularly elected representative government for the region, and

the instrument of government therefor, may be created by the General Assembly by law, or by the counties within or partly within the region acting concurrently by law, or by affirmative action of a majority of the registered voters of the region voting upon a plan proposed by a petition signed by a number of registered voters of the region equal to at least five per cent of the vote cast in the region for governor in the most recent gubernatorial election.

Section 7.04. **Change of Structure of Regional Government.**

The instrument of government for a region shall provide for amendment of the instrument by the affirmative vote of a majority of the voters of the region voting on an amendment submitted by the governing body or by petition of the voters in accordance with the provisions of the instrument.

Section 7.05. **Powers of Regional Governments.**

Powers may be vested in a regional government either by all counties within or partly within a region relinquishing powers to the regional government by law, by the General Assembly by law withdrawing specified powers from all counties within or partly within a region and conferring the powers upon the regional government, or by the General Assembly by law delegating powers of the State to the regional government. A power conferred upon a regional government may thereafter by law be relinquished by the regional government or be withdrawn by the General Assembly. In either event the power relinquished by or withdrawn from the regional government shall revert only to the respective counties or to the State, from which it originated.

Section 7.06. **Powers of Intergovernmental Authorities.**

The General Assembly or a popularly elected representative local government may by law grant to intergovernmental authorities the power to impose and collect service charges, to borrow money and to collect taxes imposed by the General Assembly or by the popularly elected representative local government, but may not grant the power to impose taxes.

COUNTIES

Section 7.07. **Powers of Counties.**

A county may exercise any power, other than judicial power, or perform any function which is not denied to it by this Constitution, by its charter or by a public general law which in its terms and in its effects is applicable to all counties or to all counties of the county's class, and which has not been transferred exclusively to another governmental unit.

Section 7.08. **Classification of Counties.**

Classes of counties, based upon population as determined by the most recent United States Census or upon other criteria, may be prescribed by law with not more than five classes and not less than three counties in any one class. No more than one classification shall be in effect at any one time but the classification may be changed at any time.

Section 7.09. **General Application of Laws.**

Except as otherwise specifically provided in this Constitution, the General Assembly may not enact any public local laws and, except with respect to appropriations, may enact only public general laws which in their terms and in their effects apply without exception to all counties or to all counties in a class. No county shall be exempt from any public general law applicable to counties in its class.

Section 7.10. **Structure of County Governments.**

Within one year following adoption of this Constitution, the General Assembly shall provide by law alternative procedures by which an instrument of government of a county may be proposed: by enactment of the local governing body, by petition of ten per cent of the qualified voters of the county, by board created by enactment of the local governing body or created by the voters of the county approving a voters' petition for such a board, or by such other methods as may be prescribed. An instrument of government shall be submitted for adoption by the affirmative vote of a majority of the voters of the county voting thereon. The General Assembly shall provide by law an instrument of government which shall become effective on the first day of January of the fourth year following the effective date of this Constitution for those counties which have not previously adopted an instrument of government as provided in this section.

Section 7.11. **Continuance of Existing County Governments.**

County governments existing at the effective date of this Constitution shall continue unless changed pursuant to this Constitution.

Section 7.12. **Change of Structure of County Government.**

An instrument of government of a county may be amended by the affirmative vote of a majority of the voters of the county voting on an amendment submitted by the governing body or submitted upon petition of voters in accordance with the provisions of the instrument of government.

CREDIT LIMITATIONS

Section 7.13. **Gift or Loan of Assets or Credit of Local Governments.**

The assets or credit of a county, representative regional government, or intergovernmental authority shall not in any manner be given or loaned to any individual, association, or corporation unless a public purpose will be served thereby and unless authorized by its governing or authorizing body by act stating the public purpose, and in the case of a gift or loan of credit or a loan of assets, passed by the affirmative vote of three-fifths of all its members.

MUNICIPALITIES

Section 7.14. **Municipal Corporations.**

A county may provide by law for the incorporation, change, merger, dissolution and alteration of boundaries of municipal corporations located in the county,

and may delegate powers of the county to any municipal corporation. No existing municipal corporation may be dissolved or have withdrawn any existing powers set forth in its charter without either the consent of its governing body or the consent of the General Assembly by law.

COOPERATIVE AGREEMENTS

Section 7.15. **Intrastate Intergovernmental Agreements.**

A county, municipal corporation or other governmental unit may, except to the extent prohibited by law, agree with the State or with any other county, municipal corporation or governmental unit for the joint administration of any functions and powers and the sharing of the costs thereof.

ARTICLE VIII. GENERAL PROVISIONS

Section 8.01. **Taxes.**

No tax shall be imposed except for a public purpose and except by the elected representatives of the people exercising legislative powers.

Section 8.02. **Assessments.**

No assessment nor any exemption therefrom with respect to any tax imposed by the State or any governmental unit thereof shall be made except pursuant to uniform rules within classes or subclasses of taxpayers, property or events as may be provided by law and such classes or subclasses may include property devoted to agricultural or open-space uses.

Section 8.03. **Public Education.**

The State shall provide by law for a statewide system of free public schools sufficient for the education of, and open to, all children of school age, and shall also provide for such other public educational institutions as may be desirable for the intellectual, cultural and occupational development of the people of this State.

Section 8.04. **Higher Education.**

The University of Maryland shall be managed by the regents of the University of Maryland in accordance with law, and the regents shall have exclusive general supervision of the institution and the control and direction of all expenditures from the institution's funds. The governing boards of the state colleges and other state institutions of higher education shall formulate policies for their respective institutions and shall by law be granted such additional powers of supervision, direction and control of their respective institutions and institutional funds as may be feasible and consistent with their status as public agencies.

Section 8.05. **Militia.**

The General Assembly may provide by law for a militia. The governor shall be its commander-in-chief and shall appoint its officers. The governor may call out

the militia to repel invasions, suppress insurrections, and enforce the execution of the laws. The military power of the State shall be and remain subject to civil control at all times, and only members of the militia when in actual service may be subject to trial by a military court of this State.

Section 8.06. **Interstate Intergovernmental Cooperation.**

This Constitution shall be construed to permit, except to the extent prohibited by law, the cooperation of the government of this State with any other government and the cooperation of the government of any county or other governmental unit with one or more other governments outside the boundaries of the State in the administration of their functions and powers.

Section 8.07. **Oath of Office.**

Every person elected or appointed to any office of profit or trust under the Constitution or laws of this State shall, before he enters upon the duties of such office, take and subscribe the following oath or affirmation: "I, ..., do swear (or affirm) that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of Maryland and support the Constitution and laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully, without partiality or prejudice, execute the office of ....., according to the Constitution and laws of this State." No other oath or political test shall be required.

Section 8.08. **Impeachment.**

The House of Delegates shall have the sole power of impeachment of elected officials, judges and any other state officers who may be designated by law, in cases of serious crimes or serious misconduct in office. The affirmative vote of three-fifths of all the members of the House of Delegates shall be required to impeach. Impeachments shall be tried by a special tribunal of ten judges appointed by the Supreme Court from among the judges of the State. The concurrence of three-fifths of the judges of the special tribunal shall be required to convict. Judgment upon conviction shall be removal from office and may include disqualification from holding any office of public trust, as well as deprivation of pension rights and other privileges of office. A person tried upon impeachment, whether or not convicted, shall be liable to criminal prosecution and punishment according to law.

ARTICLE IX. AMENDMENT OF THE CONSTITUTION

Section 9.01. **Amendments.**

An amendment to this Constitution may be proposed either by the affirmative vote of three-fifths of all the members of each house of the General Assembly or by the vote of a majority of all the members of a constitutional convention called by the General Assembly. In either case, the proposed amendment shall be submitted to the voters of the State at a special or general election as determined by the General Assembly or the Convention, whichever proposes the amendment. Notice of the election shall be given as prescribed by law. Unless otherwise provided, the

amendment shall become effective thirty days after approval by the vote of a majority of those voting thereon.

Section 9.02. **Constitutional Convention.**

The General Assembly may by law call a constitutional convention at any time or may at any time submit to the voters of the State the question of calling a constitutional convention. If the question of calling a convention shall not have been submitted to the voters of the State for a period of twenty years, then it shall be submitted at the next general election. A convention shall be held within one year after a majority of those voting on the question approve the calling of a convention. Within sixty days after such approval, the governor shall appoint a commission to prepare for the convention. At its next regular session following such approval, the General Assembly shall provide by law for the assembling of the convention, the election of delegates, the filling of vacancies in the postion of delegate, and the appropriation of sufficient funds for the work of the convention. The convention shall adopt its own rules of procedure. Any proposal recommended by the convention for changing the constitution shall be submitted to the voters of the State for adoption, and shall be effective only if approved by the affirmative vote of a majority of those voting thereon.

II

Draft Constitution and Commentary

ARTICLE I. DECLARATION OF RIGHTS

Introductory Comment:

The recommendations of the Commission embodied in Article I of the draft constitution result from the belief that a Declaration of Rights accompanying a state constitution should be designed primarily to reserve and declare those rights of the people which no official, no governmental agency, no transient majority may transgress. The Commission is of the opinion that the Declaration of Rights should be confined to defining with all possible clarity and simplicity those essential rights which the people wish to hold free from any diminution. It has attempted to enumerate those basic rights, to treat them with the utmost solemnity, and to formulate them so clearly as to ensure their protection against interference by any governmental agency.

The theory that certain rights are so vital to the people that they must be protected from infringement by their government is engrained in our nation's political tradition.[1] A bill or declaration of rights is contained in every state constitution.[2] Many of the provisions found in these enumerated rights in state constitutions impose restrictions upon state governments that are identical to the limitations imposed upon the states by the United States Con-

[1] The Bill of Rights of the United States Constitution (Amendments I through X) was proposed by Resolution of Congress on September 25, 1789, and ratified on December 15, 1791. Its roots in American history can be traced to the Virginia Declaration of Rights of 1776, the Declaration of Independence and the constitutions of the original thirteen states, and deeper still, in English history, to the English Bill of Rights of 1689 and the Magna Carta of 1215. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT (2d ed. 1954). Almost all the provisions of the Declaration of Rights of the present Maryland Constitution originated in the first Maryland Constitution of 1776 and were preserved in the Maryland Constitutions of 1851, 1864 and 1867.

[2] Students of state constitutions are indebted to the Legislative Drafting Research Fund of Columbia University for two indispensable research volumes: CONSTITUTIONS OF THE UNITED STATES, NATIONAL AND STATE (1962), which contains verbatim texts, supplemented annually, of the constitutions of the United States and of each of the states; and INDEX DIGEST OF STATE CONSTITUTIONS (2d ed. 1959) (hereafter cited as INDEX DIGEST), which indexes and compares, by subject matter, all state constitutions, and is supplemented periodically.

stitution.[3] The question arises then as to whether a Declaration of Rights is necessary at the state level. The Commission concluded that the question should be answered unhesitatingly in the affirmative. A state Declaration of Rights remains an essential bulwark of the people's fundamental liberties.

This is so even though the Fourteenth Amendment to the United States Constitution brought federal protection for many of the civil rights often guaranteed by state constitutions. The United States Supreme Court has held that many of the provisions of the Bill of Rights of the United States Constitution (the first ten amendments) which were not originally considered applicable to the states have been made applicable to state action by the due process clause of the Fourteenth Amendment.[4] At one time or another, ten justices of the United States Supreme Court have supported the view that the Fourteenth Amendment has made applicable to state action all the provisions of the first eight amendments to the United States Constitution.[5]

The Fourteenth Amendment, therefore, provides a basic and important protection against arbitrary state action inimical to civil liberties. It remains true, however, that there are certain rights guaranteed by the federal Bill of Rights which the courts have not found that the Fourteenth Amendment has extended to state action. Thus, the United States Supreme Court has excluded states from the coverage of the federal Bill of Rights in such areas as freedom from double jeopardy,[6] indictment by grand jury,[7] and trial by jury in both civil and criminal cases.[8]

For this reason national guarantees against state infringement of civil rights may be regarded as only minimal guarantees. The states themselves bear the responsibility for enlarging upon the basic protections in the national Constitution. It is an urgent responsibility since state and local governments are primarily responsible for the protection of life and property through the definition and enforcement of the criminal law. The role of state and local governments in providing for the health, safety and welfare of their people provides ample opportunity for the improper use of governmental power against which individuals would have no recourse were it not for protections afforded by a state Declaration of Rights.

The present Maryland Declaration of Rights is a lengthy document containing forty-five articles couched in ex-

[3] This is particularly true of the substantive rights of freedom of speech, press, religion and assembly and the procedural guarantees of "due process of law" and "a speedy and fair trial." INDEX DIGEST; RANKIN, STATE CONSTITUTIONS: BILL OF RIGHTS 2 (National Municipal League 1960).

[4] Most notably: the First Amendment guarantees of freedom of religion, Cantwell v. Connecticut, 310 U.S. 296 (1940), and speech, press and assembly, De Jonge v. Oregon, 299 U.S. 353 (1937); the Fourth Amendment protection against unreasonable searches and seizures, Wolf v. Colorado, 338 U.S. 25 (1949), and Mapp v. Ohio, 367 U.S. 643 (1961); the Fifth Amendment privilege against compulsory self-incrimination, Malloy v. Hogan, 378 U.S. 1 (1964); and the Sixth Amendment right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963).

[5] Malloy v. Hogan, 378 U.S. 1, 4 (1964).

[6] Palko v. Connecticut, 302 U.S. 319 (1937).

[7] Hurtado v. California, 110 U.S. 516 (1884).

[8] Maxwell v. Dow, 176 U.S. 581 (1900) (Sixth Amendment criminal cases); and Walker v. Sauvinet, 92 U.S. 90 (1875) (Seventh Amendment civil cases).

hortatory language, much of which is rhetoric and general declarations of principles concerning the rights of citizens and their relationship to the state government. The Commission is of the opinion that the solemnity of a new constitution would be enhanced by a more concise statement of the rights secured to the people. Moreover, the Commission recommends the omission of unenforceable statements of principle so that the mandatory nature of the guaranteed rights will be unquestioned. In this, the Commission takes as its model the Bill of Rights in the United States Constitution. Indeed, constitutional developments of recent years have moved the federal and state governments towards a single standard in the area of personal freedoms. The Commission has made a deliberate effort to conform to the standards that have evolved. In many instances the Commission has adopted the language of the United States Constitution, thereby making available an established, and controlling, body of jurisprudence for guidance in the application of the provisions of the Maryland Declaration of Rights.

The Commission believes that what has emerged from its deliberations is a judicially enforceable document which provides real and vital protection to the individual.

Section 1.01. **Purpose of Government.**

All political power originates in the people and all government is instituted for their liberty, security, benefit and protection.

Comment:

This draft section supersedes Articles 1, 4, 6 and 7 of the present Declaration of Rights. In essence it is a statement of the principle of popular sovereignty. This revision is offered in the belief that it is simpler and more readily comprehended than the detailed and prolix statements in the present Declaration.

The compact theory of government, stated in Article 1 of the present Declaration, was discussed by the Commission but was not considered to be of current validity and is, therefore, not included in this draft section.

Much of the language of the present Declaration has come down from the Maryland Constitution of 1776 and unquestionably may be regarded as a link with the traditions and history of the State. A minority of the Commission members was of the opinion that an effort should be made to preserve as much as possible of the traditional language and phrasing. The objection was made that the language favored by the majority was "sterile and test-tube like." The alternative provision recommended by the Commission to reflect the minority's view is as follows:

> That all government of right originates from the people and is instituted solely for the good of the whole.
>
> The people of this State have the sole and exclusive right of regulating the internal government and police thereof, as a free, sovereign and independent State.
>
> The right of the People to participate in the Government is the best security of liberty and the foundation of all free Government.
>
> All persons invested with the Legislative or Executive powers of Government are the Trustees of the

Public, and, as such, accountable for their conduct.

The majority of the Commission members are persuaded that there are factors other than traditionalism which weigh more heavily in determining the most appropriate statement of constitutional principles for this century. Accuracy and clarity of expression were thought to be of paramount importance. In addition, it was recognized that the language and statements in the present articles were born of the revolutionary ferment of 1776 and continued by the sentiments rampant during the upheaval of the Civil War. They are, however, rendered inappropriate in a modern constitution by the maturity and stability of the Union. The spirit of popular sovereignty embodied in the superseded articles of the present Declaration can best be preserved by concise expression of that idea in modern terms.

It should be noted that the difference in the section recommended by the majority of Commission members and that of the alternate favored by a minority is one of style rather than of substance. Even the alternative version departs from the original language. Neither version incorporates the right of forcible revolution as a constitutional principle although this is the thrust of Article 6 of the present Declaration, because Commission members were in agreement that such a declaration is inappropriate in a stable and unified United States. The alternative language has the virtue of preserving some of the phraseology traditional to Maryland constitutions, but the Commission believes it does so at the cost of simplicity and clarity of purpose.

Section 1.02. **Freedom of Expression.**

The people shall have the right peaceably to assemble and to petition the government for the redress of grievances. Freedom of the press and freedom of speech shall not be abridged, each person remaining responsible for abuse of those rights.

Comment:

One of the objectives of the Commission in preparing the draft Declaration was to assemble provisions currently found in rather random fashion in the present Declaration and to present them in a more coherent and orderly fashion. This section contains the substance of Articles 13 and 40 of the present Declaration. No significant changes have been made. The right of freedom of assembly is expressly stated, and the right to petition the "government" is a somewhat broader statement than that in Article 13 of the present Declaration which speaks of the right to petition the "Legislature." It should also be noted that these rights are stated in positive and affirmative terms and not merely as a prohibition against their deprivation by law.

The United States Supreme Court has ruled that the First Amendment freedoms of the press, of speech, and of peaceable assembly are protected from limitation by state action by the due process clause of the Fourteenth Amendment.[9] It appears to the Commission advantageous to cast the draft section in language similar to that used in the United States Constitution. The language in this draft section is believed to be more direct and comprehensive. The final clause which explicitly states the principle of individual responsibility for abuse of freedom of the press and

[9] De Jonge v. Oregon, 299 U.S. 353 (1937).

freedom of speech is found in Article 40 of the present Declaration and is recommended by the Commission as a desirable qualification to these broadly stated rights. This qualification makes it clear that one person may not defame another, may not incite to riot or other public disorder, and may not willfully injure another person and claim immunity for his actions under the principle of freedom of speech.

A minority of the Commission would again prefer to conform the draft section more closely to the language of the present Declaration, especially with regard to the statement of the rights of freedom of speech and freedom of the press. The alternative language recommended by the Commission to reflect this view is as follows:

> The People shall have the right peaceably to assemble and to petition the Government for the redress of grievances.
>
> Any person shall be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.

In the view of the majority of the Commission, however, substantial enlargement of these rights has occurred since 1867, primarily due to the Fourteenth Amendment to the United States Constitution which imposed First Amendment standards on state action. The standards to be met, therefore, are the First Amendment standards as established by the United States Supreme Court.[10] In such a situation there is a clear advantage in the use of First Amendment language to indicate adoption of these standards with respect to state action.

Section 1.03. **Freedom of Religion.**

No law shall be enacted respecting an establishment of religion. Every person shall have the right to worship or not to worship as he thinks most acceptable, and no person shall be disqualified from holding public office or be rendered incompetent as a witness or juror because of his opinion on matters of religious belief.

Comment:

Events of the last decade compel a complete reexamination of the provisions of the present Declaration regarding the protection of religious freedom. In recent court decisions the formulation of the principle of religious freedom found in Articles 36, 37 and 39 of the present Declaration has been found to be in conflict with the First and Fourteenth Amendments to the United States Constitution.[11] The right of citizens to the free exercise of religious belief has been held to be far more unqualified than the language of these articles suggests. For that reason the Commission recommends the simple and un-

[10] "Gitlow v. New York, 268 U.S. 652 (1925), initiated a series of decisions which today hold immune from state invasion every First Amendment protection for the cherished rights of mind and spirit—the freedom of speech, press, religion, assembly, association and petition for redress of grievances." Malloy v. Hogan, 378 U.S. 1, 5 (1964).

[11] In Torcaso v. Watkins, 367 U.S. 488 (1961), the Supreme Court held that Article 37, which requires public officeholders in Maryland to make a "declaration of belief in the existence of God," violated the "establishment of religion" clause of the First Amendment. Following this decision, the Court of Appeals of Maryland, in Schowgurow v. State, 240 Md. 121 (1965), held that the provision of Article 36 prescribing belief in the existence of God as a prerequisite to serving as a juror was unconstitutional.

qualified terms of this draft section which is confined to a statement of the broad principle of religious freedom. The Commission is of the opinion that it would be impractical to attempt a statement of all the applications of this principle.

The first sentence of this draft section is directed to the matter of affirmative state aid to, or endorsement of, religion.

In effect this sentence adopts the first clause of the First Amendment to the United States Constitution which declares that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This is consistent with the Commission's efforts to use language akin to that in the Bill of Rights of the United States Constitution in those areas where constitutional development has moved toward the creation of a single standard for both state and federal action. The suggested language has received full attention by the state and federal courts. Thus an impressive body of judicial precedent is available to resolve problems of interpretation and application to new circumstances.

The alternative approach would be to attempt to specify in detail which state actions that are in some way beneficial to religious groups are acceptable, and which are not. The Commission believes that this alternative would be ill-advised and that to attempt to anticipate all future problems and questions would be fruitless.

Again the Commission was in substantial agreement as to the substance of the draft section, but there was considerable disagreement as to the language to be used in the second sentence of the draft section. All Commission members recognized that the principle of full and complete religious freedom precluded any statement of a "duty" to worship God or a requirement of religious belief as a condition of service as a witness, juror, or public officer, stipulations which are included in Articles 36, 37 and 39 of the present Declaration. The Commission's Committee on Elective Franchise and Declaration of Rights recommended adherence to the language of the First Amendment to the United States Constitution and suggested the following:

> No law shall be enacted respecting the establishment of religion. No person shall be restricted in the free exercise of religious profession and worship, nor shall any person be disqualified from holding public office or rendered incompetent as a witness or juror because of his opinion on matters of religious belief.

A minority of the Commission advocated the use of as much of the traditional language of the present Declaration as possible and suggested the following:

> No law shall be enacted respecting the establishment of religion.
>
> Every person shall have the right to worship or not to worship as he thinks most acceptable.
>
> No person shall by any law be molested in his person or estate on account of his religious persuasion or profession or for his religious practice or the lack thereof.
>
> No person shall be disqualified from holding public office or rendered incompetent as a witness or a juror because of his opinion on matters of religious belief.

In adopting the language of this draft section, the Commission was mo-

tivated by a belief that the principle of full religious freedom requires a stronger statement than the version suggested by the Committee on Elective Franchise and Declaration of Rights. With regard to the suggested alternative, it was felt that in view of the unconstitutionality of Article 36 of the present Declaration which requires a belief in God, it would be best to avoid an attempt to incorporate any of the present language in the draft section. The Commission included in the draft section a positive affirmance of the right not to worship, in recognition of the constitutional development of religious freedom commencing with *Cantwell v. Connecticut*,[12] under which state and federal governments are forbidden to favor one religion over another, or to favor those of religious persuasion over those who deny the existence of a deity.

Section 1.04. **Due Process.**

No person shall be deprived of life, liberty or property without due process of law, or be denied the equal protection of the laws, or be subject to discrimination by law or other governmental action because of religion, race, color or national origin.

Comment:

The Commission believes that the simple and direct statement in this draft section guaranteeing "due process of law" to all persons incorporates all the protections provided by Articles 19, 23, 24 and 32 of the present Declaration. Articles 19 and 23 use the phrase "by the Law of the Land" or "by the course of the law of the land" instead of the familiar "due process of law" of the national Bill of Rights. But as early as 1838 the Court of Appeals of Maryland interpreted the phrase "by the Law of the Land" in the 1776 Constitution to mean "by the due course and process of the law."[13] More recently, the Court of Appeals has observed that, "in construing the due process clause of the Fourteenth Amendment [Article 23] . . . the Supreme Court [of the United States] cases are 'practically direct authorities.' "[14] The Commission chose to use the terminology, "due process of law," because it wished to assure continued uniformity of interpretation with that concept in the federal Constitution, and because of the advantage which follows from the use of words which have been repeatedly construed by the courts.

The courts have not formulated a rigid definition of the phrase "due process of law," preferring instead to expand the term as future circumstances dictated. The phrase, however, has invariably been applied to the treatment of a person by the government or any of its agencies. The requirement of "due process" insures that no person shall be deprived of those rights which are "implicit in the concept of ordered liberty."[15] It is this clause which restrains governments from arbitrary and capricious action detrimental to one's life, liberty or property.

Attention is called to the fact that it is this draft section and not draft Section 1.09 of this article under which, in a proper case, an indigent person accused of crime will be entitled to

[12] 310 U.S. 296 (1940).

[13] University of Maryland v. Williams, 9 Gill & J. 365, 412 (1838).

[14] Rafferty v. Comptroller of the Treasury, 228 Md. 153, 161 (1962).

[15] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

have counsel (and perhaps other assistance) provided for him at the expense of the State to aid in his defense.[16] The exact limits of this right are not stated in this draft section but are left to be developed by the courts in expounding upon due process of law and in extending to all persons rights which are "implicit in the concept of ordered liberty."

The second clause of the first sentence of this draft section adds a guarantee of "equal protection of the laws," a protection not expressly stated in the present Declaration. The equal protection clause, in effect, insures that all persons in similar circumstances will be treated alike by the government. The language used is again that of the Fourteenth Amendment to the United States Constitution.

The Commission's Committee on Elective Franchise and Declaration of Rights suggested that the full scope of the constitutional protection appropriate to the draft section was secured by the language, "No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the law." A substantial majority of the members of the Commission, however, advocated including in the second sentence the explicit prohibition against discrimination even though the language might be deemed unnecessary. Although it was argued that the protection afforded by the explicit prohibition against discrimination is implicit in the equal protection clause, the Commission concluded that the principle deserved positive and independent expression. The added clause is in no way intended, however, as a limitation of any kind on the broad sweep of the phrase, "equal protection of the laws."

It should be observed that the language prohibiting discrimination refers only to discrimination by law or other governmental action. This qualification is consistent with the Commission's position that the function of a Declaration of Rights is to state those personal rights which the people want protected from the exercise of the powers of government and that a constitution or Declaration of Rights should not be used as the means for protecting the rights of private persons against the actions of other private persons.

Section 1.05. **Eminent Domain.**

Private property shall not be taken for public use without just compensation.

Comment:

This draft section states in comprehensive terms the principle that no agency of the government shall take private property for public use without the payment of just compensation. The language used is that of the Fifth Amendment to the United States Constitution.

The power of the State to take private property for public use is termed the right of "eminent domain." In the present Constitution Sections 40, 40A and 40B of Article III, on the Legislative Department, limit, with rather detailed qualifications, the right to take private property by exercise of the right

[16] See commentary under draft Section 1.09 and footnotes 25, 26, 27, 28, 29 and 30. It should be noted that this draft section, unlike draft Section 1.09, is not limited to criminal cases but extends to property as well as life and liberty and therefore applies in civil actions.

of eminent domain. Even if the Convention were to include in its proposal for a new constitution the present or similar detailed limitations on the power of the General Assembly to enact laws under which private property may be taken for public use, the Commission believes that the general statement of the inviolability of private property from a taking for public purposes deserves expression in the Declaration of Rights.

Section 1.06. **Jury Trial in Civil Cases.**

Every person shall have the right of trial by jury of issues of fact in civil proceedings at law in the courts of this State in which the amount or value in controversy exceeds such minimum as may be fixed by law.

Comment:

The Commission has included in this draft section the right to a jury trial in civil proceedings at law where the amount or value in controversy exceeds a statutory minimum. This right, appearing in Articles 5 and 23 of the present Declaration of Rights and Article XV, Section 6 of the present Constitution, is firmly rooted in the Maryland tradition. The right to a jury trial was first adopted as part of the Maryland Declaration of Rights by the Constitutional Convention of 1776 and was included in the body of the Constitution itself in 1851.

This draft section gives to the legislature the right to establish a minimum jurisdictional amount as a prerequisite to a jury trial. In contrast, Article XV, Section 6 of the present Constitution preserves the right of trial by jury in civil proceedings at law where the amount in controversy exceeds the sum of five dollars. The Seventh Amendment to the United States Constitution provides for jury trial in suits at common law tried in federal courts where the value in controversy exceeds twenty dollars.

The Committee on Judicial Administration of the Maryland State Bar Association recently recommended that the provision in Article XV, Section 6 of the present Constitution be retained, but that the five-dollar minimum be raised to five hundred dollars. Seven states specifically provide in their constitutions for the right to a trial by jury without establishing a monetary minimum amount in controversy.[17] Five additional states specifically provide in their constitutions for the right to a trial by jury with a small monetary minimum amount in controversy.[18] Twenty-nine other states provide for the right to trial by jury in civil cases in various ways.[19]

The Commission realized that retention of the present minimum jurisdictional amount of five dollars would result in a right to a jury trial in every civil proceeding at law. The Commission feared that if a jury trial could be demanded in all civil proceedings at law, the recommendation of the Commission that there be a statewide court of limited jurisdiction where minor disputes could be expeditiously handled by judges sitting without juries would be subverted if any suit filed in the court of limited jurisdiction could be transferred to the court of general jurisdiction and tried again, by the losing party appealing and demanding a jury trial. Concern was voiced that such a situation would permit a party to file

[17] INDEX DIGEST 578.
[18] INDEX DIGEST 578.
[19] INDEX DIGEST 578.

suit in a court of limited jurisdiction for the purpose of learning his adversary's evidence and arguments, but with the intention of appealing an adverse decision, requesting a jury trial and thereby obtaining a new trial by another court. There was also concern that the widespread use of juries in numerous small disputes which could be handled by judges without juries would impede the expeditious administration of justice.

The Commission was reluctant to specify a jurisdictional amount in the constitution since any such provision would likely become outdated, and a constitutional amendment would then be required to effect a change which might be desirable to shift from one court to another a case load caused by an increasing volume of litigation. By guaranteeing the right of jury trial but empowering the legislature to establish a minimum jurisdictional amount, the ability of the legislature to resolve the problems of changing caseloads in the courts would be strengthened and the flexibility of the court system increased.

It must be remembered that the constitutional guarantee of a trial by jury extends only to the type of proceeding in which the right of trial by jury existed at common law and was recognized at the time of the adoption of the Constitution.[20] Therefore, where the proceeding did not exist at common law, the parties do not have the right to a jury trial. Furthermore, only in those cases arising "at law" and not in equity is there a right to a jury trial. For example, in an action for specific performance of a contract, a domestic relations matter, and in other similar proceedings in equity, there is no right of trial by jury.

It should also be noted that this draft section does not prescribe the number of jurors required to hear a civil suit, nor does it require a unanimous verdict of the jury as is required in criminal cases. Recognizing that the right to a jury of a specified number is not inviolable and that some states use juries of less than twelve jurors,[21] the Commission recommends that the determination of the size of the jury, and the manner in which a jury verdict should be reached, be left to the General Assembly.

Section 1.07. **Legal Limitations.**

No bill of attainder, or ex post facto *law, or law imparing the obligation of contracts shall be enacted, nor shall any conviction of crime work corruption of blood or forfeiture of estate.*

Comment:

This draft section incorporates in one section all the protections provided by Articles 17, 18 and 27 of the present Declaration, and adds an express prohibition of laws impairing the obligation of contracts. The Commission believes that this draft section sets forth these principles more simply and directly than does the present Declaration, and in language which is in accord with the constitutional traditions of the federal and state governments. Article I, Section 10 of the United States Constitution similarly provides that, "No State shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts. . . ."

Stated generally, a "bill of attainder" is an act of a legislative body declaring

[20] Commonwealth of Pennsylvania v. Warren, 204 Md. 467, 474 (1954).

[21] INDEX DIGEST 581.

a person guilty of a crime and imposing a punishment. The stipulation that no conviction shall "work corruption of blood or forfeiture of estate" prohibits a punishment from being imposed which would prevent a person from inheriting property, from retaining property he possessed, or from passing property on to his heirs. The prohibition against legislative conviction of a crime and against this form of punishment has been included in all state constitutions.

The prohibition against "*ex post facto* laws" restrains the General Assembly from enacting legislation which would retroactively declare acts criminal which were not criminal when committed. Similarly, the prohibition would prevent legislation which would increase the punishment or penalty for a crime beyond those which were in force at the time the crime was committed.

The prohibition against laws impairing the obligation of contracts restrains the legislature from enacting laws which would retrospectively limit, restrict, or abrogate contractual rights and liabilities.

Section 1.08. **Search and Seizure.**

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and in their oral or other communications against unreasonable interceptions shall not be violated. No search warrant shall be issued except upon probable cause supported by oath or affirmation, and the place to be searched, the persons or things to be seized, or the communications sought to be intercepted shall be particularly described in the warrant.

Comment:

Except that a prohibition of unreasonable interception of communications has been added, the substance of this draft section is the same as that of Article 26 of the present Declaration. The language used, however, is patterned on the Fourth Amendment to the United States Constitution. The Commission believes that the language of this draft section, phrased as an affirmative statement, is preferable because of its simplicity and directness to that in the present Declaration.

The Commission's recommendation that the federal formulation of the right to be secure against unreasonable searches and seizures be adopted was also prompted by the decisions of the United States Supreme Court in *Wolf v. Colorado,* [22] and in *Mapp v. Ohio,*[23] which held that the Fourteenth Amendment to the United States Constitution had made the Fourth Amendment applicable to state action and, therefore, requires the states, in matters of searches and seizures, to adhere to standards which previously had been imposed on federal law enforcement agencies alone. Accordingly, a single standard has evolved to which all law enforcement agencies must adhere in making searches and seizures. Since the language of this draft section is similar to that in the federal Constitution, an established body of law will be available to guide in its interpretation.

The initial recommendation of the Commission's Committee on Elective Franchise and Declaration of Rights did not include the reference to interception of "oral or other communications." A substantial majority of the Commission advocated the inclusion of this express reference in order to make it absolutely

[22] 338 U.S. 25 (1949).

[23] 367 U.S. 643 (1961).

clear that the draft section gives protection not only against unreasonable searches of persons and premises, but also against the increasingly sophisticated techniques of wire-tapping, electronic listening, and all similar forms of eavesdropping. The language used, however, is broad enough to cover devices or means which might be developed in the future and would not be electronic.

Although it has been argued that the language of the Fourth Amendment to the United States Constitution is broad enough to cover such invasions of privacy, the United States Supreme Court has consistently ruled that surreptitious recording of oral communications does not constitute a search and seizure within the meaning of that amendment.[24] The Commission believes that this is an area in which the rewriting of the Declaration of Rights can add significantly to the historic protections offered by the federal Bill of Rights. It is the Commission's firm conviction that invasion by any means or device of the privacy ordinarily attendant upon private communications, without the safeguards provided by this section, should not be tolerated. Some members of the Commission did express some concern that this draft section might unduly hamper law enforcement.

The problems attendant upon electronic eavesdropping did not exist when the present Constitution was adopted 100 years ago. They are now a subject of public concern and the Commission urges a full study and consideration of the entire matter by the Convention.

Section 1.09. **Rights of Accused.**

A person accused of crime shall have the right to be informed of the charge against him in time to prepare his defense, to have the assistance of counsel in his defense, to be confronted with and to examine under oath or affirmation the witnesses against him, to have compulsory process for obtaining witnesses and to have a speedy and public trial in the jurisdiction where the crime is alleged to have been committed and before an impartial jury, without whose unanimous consent he shall not be adjudged guilty.

Comment:

This draft section presents a succinct statement of all those basic requirements necessary for the fair trial of one accused of a crime. The section incorporates all the protection provided by Articles 20 and 21 of the present Declaration and, in some respects, clarifies and enlarges that protection.

Originally, in England at common law an accused was not permitted to be represented by counsel on any indictment for treason or felony. This was not the rule generally accepted in the Colonies; but, nevertheless, the guarantee to every person accused of crime of the right "to be allowed counsel" contained in Article 21 of the present Declaration "was intended to do away with the rules which denied representation by counsel, but was not aimed to compel the State to provide counsel for the accused."[25] On the other hand, the

[24] Olmstead v. United States, 277 U.S. 438 (1928); On Lee v. United States, 343 U.S. 747 (1952); Lopez v. United States, 373 U.S. 427 (1963).

[25] Raymond v. State, 192 Md. 602, 607 (1949); Betts v. Brady, 316 U.S. 455, 466 (1942).

United States Supreme Court has construed the similar provision of the Sixth Amendment to the Constitution of the United States that an "accused shall enjoy the right . . . to have the Assistance of Counsel for his defence," to require the appointment of counsel in all cases where an accused is unable to secure the services of an attorney and has not waived his right.[26] The United States Supreme Court had also held that this Sixth Amendment requirement of counsel was applicable only to the federal government and did not extend to the states.[27] In *Gideon v. Wainwright*,[28] however, the United States Supreme Court reversed its prior ruling and held that the Sixth Amendment's guarantee of counsel is one of those rights which is "fundamental and essential to fair trials" and is therefore made obligatory upon the states by the due process clause of the Fourteenth Amendment.[29]

The requirement of this draft section that every person accused of crime shall have the right "to have the assistance of counsel in his defense" is not intended to broaden the scope of the corresponding language of Article 21 of the present Declaration, nor to formulate a new rule requiring the State to provide counsel for a person accused of crime in every case in which he cannot himself provide counsel. On the contrary, it is intended in this draft section merely to restate the rule that every person accused of crime may, if he chooses, be represented by a lawyer. The obligation of the State to provide counsel to persons accused of crime who are unable to obtain counsel will continue to be based upon the due process clause of the Fourteenth Amendment to the United States Constitution and the similar guarantee in draft Section 1.04 of this article. The effect of each will be to require the State to provide counsel for indigent persons accused of crime in those cases where, and at such time as, "due process of law" requires such action, that is, where the right to be furnished counsel is, under the circumstances, "implicit in the concept of ordered liberty."[30]

This draft section reflects certain principles deeply rooted in our legal tradition, namely, that a person should not be deprived of life or liberty by secret testimony in clandestine proceedings; that it is the duty of the State to provide compulsory process to help an accused secure the presence of witnesses who may aid his defense; that a person should not be confined for an unreasonable period of time without a trial to determine his guilt or innocence; that the judicial system and procedure by which an individual may be deprived of life or liberty should operate under full public scrutiny; that an accused should not be removed for trial against his will to a place where it may be more difficult for him to defend himself; and that a unanimous verdict should be required for conviction of a crime by a jury. A substantial minority of the Commission was of the opinion that a unanimous verdict should not be required by the constitution and that the matter should be left to the General Assembly.

[26] Foster v. Illinois, 332 U.S. 134, 136-37 (1947); Johnson v. Zerbst, 304 U.S. 458, 467-68 (1938).

[27] Betts v. Brady, 316 U.S. 455, 461-62 (1942); Foster v. Illinois, 332 U.S. 134, 136-37 (1947).

[28] 372 U.S. 335 (1963).

[29] 372 U.S. 335, 342-44 (1963).

[30] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

It should be noted that this draft section does not include mention of the right of the accused "to have a copy of the indictment or charge" since the Court of Appeals of Maryland has consistently held that this stipulation in Article 20 of the present Declaration does not require an indictment in every case. The Commission deemed sufficient the statement in the draft section that an accused "shall have the right to be informed of the charge against him in time to prepare his defense."

Section 1.10. **Double Jeopardy; Self-Incrimination.**

No person shall be twice put in jeopardy of criminal punishment for the same offense or be compelled in any criminal case to be a witness against himself.

Comment:

Protection of persons against double jeopardy in criminal actions does not appear in the present Declaration. This protection does appear in the Fifth Amendment to the United States Constitution; although, the United States Supreme Court has held that this provision of the Fifth Amendment is not extended to the states by the Fourteenth Amendment.[31] The Commission recommends that a prohibition against double jeopardy be included in the draft Declaration in the belief that this protection is of basic importance and warrants constitutional expression. Certainly a citizen can experience no greater harassment than to be called upon to defend himself against a criminal accusation of which he has previously been acquitted. The word "criminal" was inserted before the word "punishment" to make it clear that this draft section does not prevent consequences in addition to criminal punishment attaching to conviction of a crime. One convicted of a felony, for example, may be fined or imprisoned and also rendered ineligible thereafter to engage in any business involving alcoholic beverages. Imposing such a legal disability on a convicted felon does not constitute double jeopardy.

The second clause of this draft section provides the same protection as is found in Article 22 of the present Declaration. The language is substantially the same as that in the present Declaration. It has been rephrased as a direct and affirmative statement of the traditional privilege against self-incrimination.

This privilege is one of those guaranteed by the Fifth Amendment to the United States Constitution which the United States Supreme Court has held is extended to the states by the Fourteenth Amendment. The Supreme Court stated in *Malloy v. Hogan*[32] that "the American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth."

[31] Palko v. Connecticut, 302 U.S. 319 (1937).

[32] 378 U.S. 1, 7-8 (1964).

Section 1.11. **Unusual Punishment.**

Excessive bail shall not be required. Neither excessive fines nor cruel and unusual punishment shall be provided by law or be imposed by the courts.

Comment:

This draft section is designed to incorporate all the protection provided by Articles 16 and 25 of the present Declaration. The first sentence of this draft section is identical to the first clause of the Eighth Amendment to the United States Constitution and is virtually the same as Article 25 of the present Declaration.

Most state constitutions expressly provide for the right of the accused to be released on bail.[33] This right is often qualified by a stipulation that release on bail is not permitted in certain specified cases.[34] Maryland constitutions have never included an express statement of the right to release on bail, but the Court of Appeals of Maryland has held that the right to release on bail in an appropriate case is a right which existed at common law and that this rule of the common law has remained in force in Maryland.[35] The "right" to be released on bail in an appropriate case is now granted by Maryland Rule 777. Similar provisions are found in Rule 46 of the Federal Rules of Criminal Procedure.

This draft section is intended to make clear that the restriction against excessive fines and cruel and unusual punishment applies not only to laws enacted by the General Assembly but also to judicial action. Thus the enactment by the legislature of a law prescribing an excessive sanction for a specified offense would violate this section, as would also the imposition by a court of excessive punishment for the commission of a crime for which no specific punishment was prescribed by statute.

This draft section omits the admonition in Article 16 of the present Declaration that "sanguinary Laws ought to be avoided as far as it is consistent with the safety of the State." In modern usage a "sanguinary law" is one providing for capital punishment. The Commission suggests that a law prescribing capital punishment for other than a most serious crime would be considered "cruel and unusual" by present day standards, and so would be prohibited by this draft section.

Section 1.12. **Habeas Corpus.**

The privilege of the writ of habeas corpus shall not be suspended and the provisions of this Constitution shall apply both in time of war and in time of peace.

Comment:

The Commission recommends that the right to the writ of habeas corpus be expressly recognized in the Declaration of Rights. This draft section does not alter the protections presently assured but merely consolidates the substance of Article 44 of the present Declaration with the prohibition presently found in Article III, Section 55 of the Constitution. The unqualified statement in this draft section makes the prohibition applicable against any agency of the State, as well as against the General Assembly.

[33] INDEX DIGEST 48.

[34] The usual exception is for capital offenses where the proof is evident or the presumption of guilt is great. INDEX DIGEST 48.

[35] Fischer v. Ball, 212 Md. 517 (1957).

Section 1.13. **Reserved Rights.**

This enumeration of rights shall not be construed to impair or deny others retained by the people.

Comment:

This draft section is identical to Article 45 which concludes the present Declaration. It reflects the idea expressed by the Maryland Court of Appeals as "the people's reserved powers of sovereignty."[36] The specific enunciation of certain rights, particularly chosen because of their fundamental importance, should not be construed to limit or impair in any way other rights and privileges held by the people.

[36] Board of Supervisors of Elections v. Attorney General of Maryland, ____ Md. ____ (April 14, 1967) (Daily Record, May 2, 1967).

ARTICLE II. SUFFRAGE AND ELECTIONS

Introductory Comment:

The recommendations of the Commission embodied in draft Article II are based upon the belief that suffrage should be extended to as many qualified residents in the State as possible while retaining such limitations as are necessary to prevent voting in state elections by transients; that in the case of elections for President and Vice President of the United States all persons who meet the most minimal residence requirement should be enfranchised; that persons residing in federal enclaves should be allowed to vote in both state and national elections; that municipalities ought to be permitted to impose a longer residence requirement and should also be permitted to allow voting by non-resident property owners; that a uniform system of voter registration should be required; and that providing the detailed machinery for carrying out elections should be a function of the General Assembly.

The Commission considered numerous proposals for provisions creating a right of initiative and a right of recall. The right of initiative would permit citizens to initiate by petition legislative proposals that would be voted upon directly by the people in a general election. The right of recall would permit a prescribed minimum number of persons to file a petition subjecting an elected state officeholder to a public referendum on the question of whether or not he should continue in office. The Commission recommends that there be no provision for either initiative or recall in the new constitution. However, both questions have been researched by staff members of the Commission and a monograph on provisions for each in other state constitutions has been prepared for the Convention.[37]

In draft Article II the Commission has assembled the provisions relating to voter eligibility, regulation of elections, and the referendum. This draft article contains those matters now in Articles I, XVI and XVII of the present Constitution, as well as some provisions now in articles which are principally concerned with other topics. The inclusion in one article of all provisions relating to suffrage and elections has eliminated the duplication and inconsistency in terminology which presently exists. Certainly, the recommended draft facilitates comprehension and application of these provisions.

The constitutional provisions on voter eligibility have been reduced to the absolute essentials. This draft article assigns to the General Assembly the responsibility for prescribing by law the detailed provisions relating to voter eligibility, voter registration and organization of elections.

[37] Ralabate, "Direct Legislation," 1967 (monograph among unpublished papers of Maryland Constitutional Convention Commission in Enoch Pratt Library, University of Maryland Library, Maryland State Library, Johns Hopkins University Library).

VOTERS

Section 2.01. **Eligible Voters.**

Every citizen of the United States who has attained the age of twenty-one years, who has been a resident of this State for six months and of the House of Delegates district in which he offers to vote for three months next preceding an election, and who is registered to vote, shall be qualified to vote at such election for all officers to be elected by the people and upon all questions submitted to a vote of the people. Removal from one house district to another in this State shall not deprive a person of his qualification to vote in the house district from which he has removed until three months after his removal.

Comment:

The two principal conditions for voting eligibility relate to age and period of residence.

AGE

This draft section retains the present age requirement of twenty-one years. Consideration was given to a proposal to lower the voting age to eighteen and there was a Commission hearing on the question, but there was no strong support voiced for such a change.[38]

Any decision as to voting age must be arbitrary, but it should have a sound theoretical basis. An age must be set at which it may be assumed that most if not all people have acquired a maturity of judgment and the good sense to think for themselves.

There are approximately 9,300,000 Americans between the ages of eighteen and twenty-one; and of these, 560,000 currently are serving in the armed forces. The latter compose approximately twenty-two per cent of all active military personnel. Under proposed draft law changes there will be many more young people between the ages of eighteen and twenty-one in the armed services in the near future than at present.[39]

Since 1942, sixty joint resolutions for amendment of the United States Constitution to lower the voting age have been presented in Congress. Although this legislation has received the bipartisan support of such notables as the late Presidents Franklin D. Roosevelt and John F. Kennedy, former President Dwight D. Eisenhower, President Lyndon B. Johnson and former Senator Barry Goldwater, it has for the most part been defeated in committee.[40]

The primary arguments for retaining the minimum age of twenty-one as a basic suffrage requirement are:[41]

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[38] XII Proceedings of the Maryland Constitutional Convention Commission 1966, Meeting of May 16, 1966; I Proceedings of the Maryland Constitutional Convention Commission 1966, Meeting of June 20, 1966 (unpublished papers of the Commission in Enoch Pratt Library, University of Maryland Library, Maryland State Library, Johns Hopkins University Library).

[39] *A Special Message of Selective Service Sent to the Congress by the President,* House of Representatives Document 75, 90th Congress, 1st Session (1967).

[40] House of Representatives Journal, Resolution 486, 90th Congress, 1st Session (1967).

[41] XII Proceedings of the Maryland Constitutional Convention Commission 1966, Meeting of May 16, 1966; I Proceedings of the Maryland Constitutional Convention 1966, Meeting of June 20, 1966 (unpublished papers of the Commission in Enoch Pratt Library, University of Maryland Library, Maryland State Library, Johns Hopkins University Library).

1. It has long been the tradition in forty-six of the states.

2. The same reasons should apply in establishing the minimum age for voting as for establishing the legal age of majority, and in Maryland in the past few years the legal age of majority for most purposes has been standardized at twenty-one years.

3. Lowering the voting age would add to the voting population many persons who are idealistic rather than practical due to their lack of experience in adult society.

4. Reducing the voting age would add to the voting population persons highly influenced by their parents, schools, television and special interest groups.

5. If the voting age were reduced to eighteen, many small college communities would find their municipal governments overrun by energetic college students.

Those who favor reducing the voting age to eighteen argue that the sweeping changes in modern society require the responsibilities of full citizenship at an increasingly earlier age, for the abundant, diverse and complex problems of today affect individuals at every age level. The right to vote is a means by which individuals influence the political decision-making process in order to solve their problems. The goal is to insure that all individuals capable of assuming the responsibilities of citizenship are duly represented in the political community.[42]

Those who favor reducing the voting age to eighteen also argue that:[43]

1. Persons in the eighteen to twenty-one year old group are better educated today than such persons were when the precedent of the twenty-one year old voting age was established.

2. Under the laws of some states, eighteen year olds can make wills, get married, pay income taxes, obtain licenses to operate automobiles, own firearms and be sued.

3. Eighteen year olds can be drafted and their lives endangered; yet they are denied the right of voting for the composition of that government they are asked to defend.

4. The national average age of the electorate is rising; however, the problems faced by the nation are felt increasingly by the young people. Unemployment is an example of a problem which acutely focuses on the eighteen to twenty-one year old group.

5. The sense of responsibility of persons in the eighteen to twenty-one year old age group would improve and broaden if they were given the right to vote. They would more easily become part of the political system, rather than its eternal gadfly.

6. To work for the federal government, the minimum age under the Civil Service laws is eighteen.

7. Since the advent of student participation in the civil rights movement, eighteen to twenty-one year old students have assumed responsibilities for the concerns of the nation by registering voters, tutoring disadvantaged children and youth, and assisting in the development of nations through the Peace Corps.

Eighteen to twenty-one year olds have been allowed to vote in the State

[42] Report of the President's Commission on Registration and Voting Participation (Dec. 20, 1963).

[43] Liebert, On Lowering the Voting Age to 18 (United States National Student Association pamphlet undated).

of Georgia since 1943[44] and in Kentucky since 1955.[45] Alaska allows voting at the age of nineteen,[46] and Hawaii at the age of twenty.[47] Officials in Georgia and Kentucky, including school officials, have uniformly endorsed their state laws conferring suffrage at the age of eighteen.[48]

After reviewing the reasons for and against a reduction in the minimum voting age, the Commission concludes that the arguments for lowering the voting age in Maryland are not persuasive. The Commission, therefore, recommends retention of the age of twenty-one years as the basic suffrage requirement.

RESIDENCE

This draft section reduces the present requirement of one year's residence in the State and six months' residence in the legislative district to six months' residence in the State and three months' residence in the House of Delegates district in which the individual offers to vote. The reduced period of residence conforms to an apparent trend in this direction as evidenced by some of the more recently adopted state constitutions.[49] The Commission believes this change highly desirable. It is apparent that modern communications media make it significantly easier for citizens to acquaint themselves with issues and candidates than was the case a century ago. The requirement of one year's residence in the State, although typical of state voting regulations in the middle of the nineteenth century, appears inappropriate for the mobile population of this century and decade. The Commission believes that there is no real advantage to the State in continuing the present requirement and that large numbers of citizens would be inconvenienced and deprived of the opportunity to vote by its continuance. A significant number of citizens who would otherwise be disenfranchised will be eligible to vote under this draft section.

This draft section uses the term "House of Delegates district" in lieu of "Legislative District of Baltimore City, or of the county . . ." which is the language used in the present Constitution to describe the place of residence requirement. The change in terminology was necessitated by the recent reapportionment of the State. It is intended that "House of Delegates district" refer to that district from which a delegate is elected to serve in the Maryland House of Delegates. This is the smallest of the election districts for state elections.

The final provision of this draft section protects the voting eligibility of persons moving from one house district to another within the State and is essentially the same as that found in

[44] GEORGIA CONSTITUTION article II, section 2-702.

[45] KENTUCKY CONSTITUTION section 145.

[46] ALASKA CONSTITUTION article V, section 1.

[47] HAWAII CONSTITUTION article II, section 1.

[48] DOLAN, REPORT TO THE PRESIDENT'S COMMISSION ON REGISTRATION AND VOTING PARTICIPATION ON LOWERING THE VOTING AGE TO 18, appendix V, page b (Jan. 1, 1964).

[49] Connecticut (1965) requires six months' residence in the town in which the individual offers to vote. Michigan (1964) requires six months' residence in the State in addition to meeting the requirements of local residence. New Jersey (1947) requires six months' residence in the State and 60 days in the county. Hawaii (1959), Alaska (1959), and Missouri (1945) retain the one-year residence requirement. Six months' residence in the State is also specified in Idaho, Indiana, Iowa, Kansas, Maine, Minnesota, Nebraska, Nevada, New Hampshire and Oregon.

Article I, Section 1 of the present Constitution. The provision is designed to ensure that no person shall lose his right to vote in state elections merely because of a change in residence within the State.

Section 2.02. **Eligible Voters in Presidential Elections.**

A person who has been a resident of this State less than six months next preceding an election, but who is otherwise eligible to vote under this Article, may vote for President and Vice President of the United States or presidential electors in that election.

Comment:

This draft section ensures that new residents of the State will be permitted to vote for President and Vice President of the United States even though they have not resided in the State for six months and cannot vote for state officers. This draft section represents a departure from the provision of the present Constitution, the validity of which under the United States Constitution was upheld by the United States District Court for the District of Maryland.[50] In its opinion the court noted, however, that there was a strong and growing body of respectable opinion holding that the one-year residence requirement applicable to voters in elections for national office was an undesirable restriction on the right of franchise. The court further called attention to the fact that both the National Conference of Commissioners on Uniform State Laws[51] and the Attorney General of Maryland[52] had suggested reducing the required residence period for voting in national elections.

The change made by this draft section follows recent similar changes in the state constitutions of California, Ohio and Oregon.[53] The Commission advocates the change because of its belief that persons moving to Maryland from other states can be presumed to be as well informed on national candidates and national issues as persons who have theretofore resided in Maryland. Provision can be made by statute to prevent new residents from voting for President and Vice President both in Maryland and in the state of previous residence.

It should be noted that the only condition of eligibility prescribed by draft Section 2.01 which is affected by this draft section is that referring to six months' residence in the State. Three months' residence in the house district is still required of those seeking to vote for President and Vice President. All states adopting comparable constitutional provisions have prescribed some minimum period of residence for voting in national elections to permit sufficient time for accomplishing registration of new voters.[54]

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[50] Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964).

[51] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONS ON UNIFORM STATE LAWS 261-64 (1962). See also 77 HARV. L. REV. 574 (1964).

[52] Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964).

[53] CALIFORNIA CONSTITUTION article II, section 1½ (1958 amend.); OHIO CONSTITUTION article V, section 1 (1957 amend.); OREGON CONSTITUTION article II, section 8 (1960 amend.).

[54] CALIFORNIA CONSTITUTION article II, section 1½ (1958 amend.); OHIO CONSTITUTION article V, section 1 (1957 amend.); OREGON CONSTITUTION article II, section 8 (1960 amend.).

Section 2.03. **Voters in United States Enclaves.**

A person shall not be deemed ineligible to vote in national or state elections solely by reason of the fact that he resides on land over which the United States exercises exclusive jurisdiction.

Comment:

This draft section would add a new provision to the Maryland constitution. Federal reservations or enclaves located throughout the State are the residence of many persons who are present in the State for extended periods of time; persons who are required to pay state income taxes, sales and use taxes, gasoline taxes, and motor vehicle registration and operator's license fees; and frequently persons who claim no other residence in the United States. On the other hand such persons do not pay property taxes and hence do not contribute as much to the cost of local government as do other residents of the area not living in federal enclaves. By federal statute the residents of federal enclaves have been made subject to the state workmen's compensation laws and unemployment compensation laws, and by statutes the General Assembly of Maryland extended the divorce laws and adoption laws to the residents of federal reservations and opened the public schools to their children. However, the General Assembly has taken no such action with regard to voting rights, and former Attorney General Hall Hammond (now Chief Judge of the Court of Appeals) ruled in 1951[55] that a statute conferring the elective franchise on residents of federal reservations would be unconstitutional under Article I, Section 1 of the present Constitution. In any event, the Court of Appeals of Maryland has held[56] that residents of federal reservations are not residents of the State for voting purposes within the meaning of Article I, Section 1 of the present Constitution, although the court expressly refrained from deciding whether the legislature could confer the voting franchise on residents of federal reservations without an amendment of the Constitution.

The Commission recommends this draft section in the belief that there is insufficient reason for denying such persons the right to vote in state and national elections. Large numbers of these persons (doctors, teachers, administrators, scientists, technicians, etc.) are no more transient than many other segments of the population; nor are military or civilian personnel living on a government reservation more transient than their colleagues who choose to live off a federal enclave, although still federally employed. Since this draft section, by its terms, applies only to state and national elections, it renders inapplicable the common argument that persons who are residents of federal reservations are unfamiliar with, or have only a narrow interest in, local county and city matters.

Limiting the operation of the draft section to reservations over which the United States exercises exclusive jurisdiction is not too restrictive because only residents of land over which the United States has exclusive jurisdiction are deprived of the right to vote. Residents of other federal reservations are deemed to be residents of the State and are entitled to vote.[57]

[55] 36 Ops. Atty. Gen. 129 (1951).

[56] Royer v. Board of Election Supervisors, 231 Md. 561 (1963).

[57] Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964).

Section 2.04. **Disqualification.**

The General Assembly shall by law establish disqualifications for voting by reason of mental incompetence or conviction of serious crime, and may provide for the removal of such disqualifications.

Comment:

Article I, Section 2 of the present Constitution provides for the automatic disenfranchisement of a person "under guardianship as a lunatic, or, as a person *non compos mentis*." This draft section empowers the General Assembly to determine the conditions, methods and standards by which mental incompetence shall cause disenfranchisement. The present Constitution makes loss of franchise for mental incompetence dependent upon the existence of a guardianship, but a guardianship proceeding is only one of several indicia by which mental incompetence is determined. Under this draft section the General Assembly is free to deal with the problem in such manner as it determines best.

Article I, Section 2 of the present Constitution also provides for the automatic disenfranchisement of any person "above the age of twenty-one years, convicted of larceny, or other infamous crime." The vagueness of this language raises many questions. "Infamous crime" is a term of art, construed by the Court of Appeals of Maryland to mean those crimes which were "infamous" at common law and described as such by common law authorities.[58] It is entirely possible that some crimes classified as infamous crimes at common law might appear today to be insufficiently serious to warrant loss of elective franchise. Correspondingly, some acts which are crimes today were unknown to the common law, and yet are so seriously antisocial as to warrant disenfranchisement.

After extensive discussion and consideration, the Commission concluded that automatic disenfranchisement, linked to a vague standard of criminality, is not the preferable way to provide for disenfranchisement. It recommends this draft section which leaves to the legislature the power to designate and define the crimes, conviction of which shall carry the consequence of loss of the right to vote. This draft section, however, does not leave the matter completely to legislative discretion; disenfranchisement may only be imposed on those convicted of serious crime. The Commission believes that the designation of "serious crime" prevents the legislature from disenfranchising those convicted of acts which, although criminal, are nevertheless not regarded as of such enormity as to justify loss of the elective franchise. Moreover, substitution of the adjective "serious" in lieu of the adjective "infamous" frees the provision of the common law restrictions and connotations that have been attached to the term "infamous crime."

The Commission is of the opinion that the General Assembly is the body best equipped to determine the most workable standards and procedures for the restoration of the franchise. Certainly, if disqualification is to be provided by statute, then removal of the disqualification should also be provided by statute. The General Assembly can, for instance, take into account pardons granted by other states and federal

[58] State v. Bixler, 62 Md. 354, 360 (1884).

pardons. This draft section, therefore, authorizes the General Assembly to provide for the removal of the disqualification.

ELECTIONS

Section 2.05. **Election Procedure.**

The General Assembly shall by law define residence, establish a uniform system of permanent registration of voters, provide for the nomination of candidates, regulate the time, place and manner of elections, provide for the administration of elections and for absentee voting, insure secrecy of voting and protect the integrity of the election process.

Comment:

The Commission recommends that the detailed provisions in Article II, Sections 3, 4 and 5 of the present Constitution be replaced by the more general provisions of this draft section which directs and empowers the General Assembly to provide by law appropriate machinery for elections, including absentee voting, and the necessary safeguards for the election process. All such details of the election process should be provided by legislation which can be patterned to meet changing conditions rather than by a constitution which is susceptible of change only by the cumbersome amendment process. The legislative process is a more appropriate manner of dealing with such detailed matters.

Section 2.06. **General Elections.**

A general election shall be held on the Tuesday following the first Monday in November in the year 1970, and on the same day every even year thereafter. The candidates receiving the highest number of votes shall be elected to the offices for which they were candidates.

Comment:

This draft section complements draft Section 2.05 by specifying when elections shall be held. Election dates prescribed by the present Constitution are not changed, but this draft section eliminates the need for what remains of Article XVII of the present Constitution, the so-called "Fewer Elections Amendment." With draft Section 2.05 this draft section covers all, or substantially all, of the matters now covered in Article III, Sections 42, 47 and 49; Article IV, Sections 11 and 12; Article V, Sections 2 and 8; and Article XV, Sections 4 and 7 of the present Constitution.

The second sentence of this draft section is recommended as a new provision to make clear that election is by plurality vote and that the vote of an absolute majority is not required for election.

Section 2.07. **Local Elections.**

Voting qualifications for local elections shall be as provided in Section 2.01 of this Article except that a municipal corporation may establish a period of minimum residence not exceeding one year and may extend the right to vote to nonresidents owning taxable property within its limits.

Comment:

The provisions of Article I of the present Constitution relating to elective franchise do not apply to elections held by political subdivisions or to any elections not specifically referred to in the

Constitution.[59] The Commission is of the opinion that it is undesirable and unnecessary to permit political subdivisions to have unrestricted control over the establishment of voting qualifications in local elections and that political subdivisions should not have unqualified power to exclude from local elections those persons who are eligible to vote in state elections.

The Commission recognizes, however, the necessity for municipalities to tailor voting requirements to special local situations. There are issues submitted to voters in municipal elections of particular importance to the non-transient voting population. This draft section gives a municipality the right to prescribe a longer period of residence for those seeking to vote in local elections than is required for participation in state elections. This draft section also recognizes the need of some municipalities, particularly in resort areas, to extend the right to vote in municipal elections to property owners who are not residents of the municipality. It should be noted that "municipal corporation" is defined in draft Section 7.01 and does not include Baltimore City.

REFERENDUM

Section 2.08. **Right of Referendum.**

If, within sixty days from the date on which a bill becomes law, a petition is filed with the office of the governor to refer the law to a vote of the people, the law shall be submitted to a vote at the next general election. If rejected by a majority of those voting on the question, the law shall stand repealed thirty days thereafter. If the petition is filed before the date on which the law is to take effect, then, unless the law is one passed by the affirmative vote of three-fifths of all the members of each house of the General Assembly, it shall not take effect until thirty days after its approval by a majority of those voting on the question in the election.

Comment:

The use of the referendum is a concomitant of the legislative process, but the right to vote on questions submitted to the people is exercised as a part of the elective franchise. The Commission, therefore, recommends that the provisions with respect to the referendum be included in the article on the elective franchise rather than in the article on the legislative branch.

This draft section and the following draft section are quite different from Article XVI of the present Constitution. The change is dictated in part by the provisions of the draft article on the legislative branch, but some of the changes have been made for other reasons, which should be described briefly.

In this draft section the attempt has been to state the principle of the referendum in the simplest and most comprehensible terms. This makes unnecessary a counterpart of Article XVI, Section 1 of the present Constitution which consists principally of an introductory general description of the principle of the referendum. Section 2 of the present Article XVI is a lengthy, detailed and complicated provision which sets out the basic referendum procedure, describes the laws which are not subject to referendum, prescribes the effective dates of all legislation, and describes and defines emergency laws. The basic procedure of the referendum

[59] Hanna v. Young, 84 Md. 179, 183 (1896).

is set out in this draft section and the designation of the laws which are not subject to referendum is set out in draft Section 2.10, but the Commission believes that the other two matters, if deemed desirable, would be more appropriately included in the article on the legislative branch.

Under Article XVI of the present Constitution, all laws other than emergency laws become effective on the first day of June following the session of the General Assembly at which the laws are passed and those desiring to petition a law to referendum have until that date to file a referendum petition with the required number of signatures. If more than one-half but less than the full number of signatures required for the referendum are filed with the petition, the time within which the remainder of the signatures may be filed is extended to June 30. Under this draft section a single sixty-day period for the collection of signatures and the filing of the referendum petition is permitted. This period begins to run from the date on which the bill becomes law. This is the date on which the bill is signed by the governor if approved by him, or the date the bill becomes law under draft Section 4.16 if the governor fails to approve it or veto it, or the date of final passage of the bill by the General Assembly if it is passed over the governor's veto. (See draft Section 4.17.) This change in procedure is necessary because the draft article on the legislative branch does not prescribe a general effective date for laws, and, accordingly, each law will prescribe the date on which it becomes effective.

It is important to keep in mind this distinction between the date a bill becomes law and the date it becomes effective as a law. The two dates may coincide, as is the case when a bill provides that it shall become effective immediately, but in most instances there will be an interval of time between the date a bill becomes law and the effective date.

This draft section is designed to permit a referendum on a law no matter how soon after enactment it becomes effective. If the petition for referendum is filed before the effective date of the law sought to be referred, then, unless the law was passed by a vote of three-fifths of the members of both houses of the General Assembly, it will not take effect until thirty days after its approval at the referendum. The law will not be suspended, however, if the petition for referendum is filed after the effective date of the law or if the law was passed by a three-fifths vote of the members of each house of the General Assembly. This means that the General Assembly by a bare majority vote can prevent a law from being suspended pending a referendum by prescribing that the law shall take effect immediately. The Commission does not think that this is a matter of serious concern.

The exception relating to laws passed by a three-fifths vote of the members of each house of the General Assembly is similar to the provisions in Article XVI, Section 2 of the present Constitution to the effect that an emergency law shall remain in force notwithstanding the filing of a referendum petition unless, and until, it is rejected on the referendum. The only difference is that under this draft section a law passed by an extraordinary vote of the General Assembly need not be designated an "emergency law."

Section 2.09. **Referendum Petition.**

A petition shall be sufficient to refer a law, or any part thereof, to a vote of the people if signed by a number of qualified voters equal to five per cent of the total number of votes cast for governor in the most recent gubernatorial election, provided that not more than one-half of such required number shall be voters residing in any one county.

Comment:

The Commission believes that the referendum is a useful device of popular government that should be preserved in a new constitution, but it also believes that it should not be used for frivolous or obstructive purposes, since such uses can impair the normal processes of representative government. The power to suspend the operation of laws duly passed by the elected representatives of the people should be available only upon a demonstration of concern by a significant number of the citizens of the State.

Article XVI of the present Constitution provides that a referendum petition shall be sufficient only if signed by three per cent of the number of voters voting for governor in the last gubernatorial election. The Commission's Committee on Elective Franchise and Declaration of Rights recommended that this requirement be retained but some members of the Commission thought that the requirement should be increased to six per cent. After considerable debate the Commission, by a divided vote, recommends in this draft section that the number of required signers be five per cent of the number voting for governor in the last gubernatorial election.

This draft section continues unchanged the present requirement that not more than one-half of the required number of signers shall be residents of Baltimore City or of any one county.

Section 2.10. **Referendum Restrictions.**

No plan for legislative districting or apportionment or congressional districting, no law imposing a tax and no law making an appropriation for maintaining the state government or for aiding or maintaining any public institution shall be subject to referendum.

Comment:

This draft section exempts from possible referendum certain types of legislation thought to be particularly unsuited for review through direct submission to a popular vote. The Commission is of the opinion that the possibility of the enumerated types of legislation being submitted to referendum would constitute an unwise impediment to the legislative process, and would serve only to undermine the effectiveness and efficiency of the General Assembly.

The Commission has removed matters of reapportionment and redistricting from the purview of the referendum because it believes that past experience has demonstrated that referendum petitions on these matters serve no purpose except to force the courts to do that which is properly the task of the legislature.

The Commission is further of the opinion that it is impractical to subject appropriation measures to referendum. The complexity of state fiscal matters

makes it unlikely that the average citizen can appreciate the issues involved. Moreover, appropriation measures are the result of complex budgetary studies, lengthy committee hearings, and detailed staff reports—all aimed at achieving a balance between expenditures and receipts. A member of the General Assembly who is called upon to vote on an appropriation measure has been exposed to all these sources of information so that it may be presumed that his vote is an informed one. Were such matters to be subject to referendum, so that a small number of people opposed to one small aspect of an appropriation measure could delay its effective date, the entire operation of state government could be halted.

The Commission believes the clear statements in this draft section to be an improvement over Article XVI, Section 2 of the present Constitution which, in rather complicated manner, prohibits certain types of legislation from being enacted as "emergency laws" in order to ensure that they will be subject to referendum, and excludes from referendum only those appropriations which do not exceed the appropriation for the same purpose in the previous fiscal year.

ARTICLE III. LEGISLATIVE BRANCH

Introductory Comment:

The draft article on the legislative branch is formulated upon the Commission's recommendation that the General Assembly of Maryland continue to be a bicameral body. This basic recommendation is advocated after extensive deliberation which ended with the Commission being almost evenly divided on the question of bicameralism versus unicameralism, with the final vote standing at 13 in favor of bicameralism and 12 in favor of unicameralism. Because of the closeness of the vote, the Commission is recommending an alternative draft article for the legislative branch based upon the General Assembly being a unicameral body.[60]

The Commission sponsored a meeting at which several authorities on the legislative process were invited to participate in a panel discussion of bicameral and unicameral legislatures.[61] This question was also discussed at a meeting with the Special Legislative Joint Committee to Cooperate with the Constitutional Convention Commission[62] and it is interesting to note that the members of the legislative liaison committee testifying on this question were also almost equally divided in opinion as between a bicameral and a unicameral legislature.

The discussion at these two meetings was transcribed and copies of the transcripts will be made available to the Convention and also placed in the depository libraries mentioned in Chapter I. A research monograph on this subject prepared by Dr. John H. Michener, entitled "The Structure of the Maryland Legislature," will also be available to the delegates to the Constitutional Convention.

No attempt will be made in this report to review in detail all the arguments made by proponents for bicameralism or unicameralism. The principal arguments for each can be succinctly stated as follows:

BICAMERALISM:

1. A bicameral legislature is embedded in the State's tradition and is well accepted by the people; it should be given a further opportunity to prove its merits under reapportionment.

2. Two houses provide a technical review and tend to minimize careless legislation.

3. A second house provides a check on hasty legislation and on legislation prompted by "popular passions."

4. A two-house system permits "graduation" from the lower house to the upper and thereby aids in developing a group of experienced and capable legislators.

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[60] The alternative draft of Article III, based upon a unicameral legislature, is set forth at the end of the commentary to Article III.

[61] Members of the panel were Dr. W. Brooke Graves, Mr. Delmar Kentner, Dr. John H. Michener, Dr. John P. Wheeler, Jr., and Dr. Clinton I. Winslow.

[62] The members of the Special Legislative Joint Committee to Cooperate with the Constitutional Convention Commission were as follows:

Members of the Senate: William S. James, ex-officio, Harry R. Hughes, Frederick C. Malkus, Jr., J. Albert Roney, Jr., J. Joseph Curran, Jr., and George R. Hughes, Jr.

Members of the House of Delegates: Marvin Mandel, ex-officio, John P. Moore, Meyer M. Emanuel, Jr., Elroy G. Boyer, Martin A. Kircher and C. Stanley Blair.

President of the Senate James and Speaker of the House Mandel were co-chairmen.

5. A bicameral legislature is more difficult to corrupt than a unicameral legislature.

6. With a bicameral system one would expect a larger legislature and the citizens might feel that this would increase the possibility that they would know someone in the legislature.

7. A bicameral system allows different representation in the two chambers of differing interests, such as rural and urban interests, and divergent economic interests.

8. The diffusion of power in a bicameral system reduces the inclination of the legislature to accumulate governmental power in its own hands.

9. A bicameral system permits the defeat of undesirable but popular legislation where outright opposition to the legislation would be politically dangerous.

UNICAMERALISM:

1. The reapportionment of state legislatures on the basis of the "one man, one vote" rule[63] eliminates the traditional reason for a two-house legislature in which one house is apportioned according to population and the other according to geography.

2. Membership in a unicameral legislature confers greater prestige than membership in a bicameral body, thus encouraging more highly qualified persons to seek legislative office.

3. The legislative process is more efficient and is conducive to a more thorough consideration of matters before the legislature.

4. The traditional rivalry between the two houses, which often has an undesirable effect on the course or content of legislation, is ended.

5. The responsibilities of individual legislators are clearer, for measures cannot be advocated by the members of one house with the expectation that the bill will subsequently be killed by the other house.

6. Opportunities for lobbying are reduced.

7. Reporting of legislative events is made easier and public awareness, interest and understanding of legislative operations and the progress of specific bills are increased.

8. There is no need for a conference committee, whose secret sessions often constitute a "third house," to settle differences between the two houses.

9. The cost of operating the legislature is reduced.

Complementary studies on the organization and operation of the General Assembly have been undertaken independently of the Constitutional Convention Commission. The first of these studies was initiated by the Young Democratic Clubs of Maryland and was carried on by a group called the Citizens' Commission on the General Assembly which issued a report in January, 1967.[64] The second study was initiated

[63] Reynolds v. Sims, 377 U.S. 533 (1964); Maryland Committee v. Tawes, 377 U.S. 656 (1964). For a general discussion of the subject of reappointment of state legislatures see BAKER, STATE CONSTITUTIONS: REAPPORTIONMENT (National Municipal League 1960); BOYD, CHANGING PATTERNS OF APPORTIONMENT (National Municipal League 1965). See also the National Municipal League Series on Reapportionment.

[64] CITIZENS' COMMISSION ON THE GENERAL ASSEMBLY, THE CITIZENS' COMMISSION ON THE GENERAL ASSEMBLY REPORTS TO THE LEGISLATURE AND THE PEOPLE OF MARYLAND (Jan. 1967).

by the Legislative Council of the General Assembly and is being conducted by the Eagleton Institute at Rutgers University.

Section 3.01. **Legislative Power.**

The legislative power of the State is vested in the General Assembly, which shall consist of two houses, the Senate and the House of Delegates.

Comment:

This draft section establishes the General Assembly as one of the three independent coordinate branches of the state government. It places all state legislative power in the General Assembly and establishes that branch as a bicameral body. This confers plenary legislative power upon the General Assembly except as otherwise limited by provisions of this constitution or the United States Constitution. This would not enlarge the existing power of the General Assembly which has plenary legislative power under the present Constitution.[65]

For historical reasons, the Commission recommends the continued use of the term "General Assembly" instead of "Legislature" and the retention of the designations of "Senate" and "House of Delegates" to denote the two houses.

DISTRICTS

Section 3.02. **Legislative Districts.**

The State shall be divided by law into districts for the election of members of the Senate and into districts for the election of members of the House of Delegates. Each district shall consist of compact and adjoining territory, and the ratio of the number of legislators in each district to the population of such district shall be as nearly equal as practicable.

Comment:

By this draft section the responsibility for districting the State for the election of members of both chambers is placed in the General Assembly. In this recommendation, the Commission departs from the prior system under which the Constitution based representation on the counties and the City of Baltimore and specified the number of delegates and senators to be elected from each. Recognizing the rapid growth and urbanization of the State and the impossibility of foretelling the future course of population growth, the Commission believes that the only practical solution is to assign to the General Assembly the power and obligation for districting, rather than to provide for it in the constitution. Further, the requirements of the "one man, one vote" rule can be expected to make impossible any rational districting that does not deviate from existing county lines. For example, it is already recognized that the smaller counties cannot each have its own senator. It is conceivable that a similar situation may exist in the future with respect to delegates.

By a vote of 15 to 10 the Commission rejected a proposal by its Committee on the Legislative Department to include in the draft constitution a requirement that the ratio of the number of legislators in each district to the population of each district for the House and

[65] First Continental Savings & Loan Assoc., Inc. v. Director, State Department of Assessments and Taxation, 229 Md. 293, 302 (1962); Maryland Committee v. Tawes, 229 Md. 406 (1962).

Senate individually not deviate from the ratio of the total number of legislators to total state population by more than five per cent. It was noted that the United States Supreme Court has not yet decided what, if any, maximum amount of deviation is permissible under the United States Constitution and, since the requirements of the United States Constitution would override any contrary provisions of the state constitution, the Commission recommends that no provision be included in the proposed constitution which would specify the extent to which deviation from the norm—absolute equality—would be permitted. Consequently, the recommended language is that representation "shall be as nearly equal as practicable."

Section 3.03. **Redistricting.**

Within three months after official publication of the population figures of each decennial census of the United States, the governor shall present to the General Assembly plans of congressional districting and legislative districting and apportionment. If the General Assembly is not in session, the governor shall convene a special session. The General Assembly shall by law enact plans of congressional districting and legislative districting and apportionment. If no plan has been enacted for any one or more of these purposes within four months prior to the final date for the filing of candidates for the next general election occurring after publication of such census figures, then the pertinent plan as presented to the General Assembly by the governor shall become law. Upon petition of any qualified voter, the Supreme Court shall have original jurisdiction to review the congressional districting and legislative districting and apportionment of the State and grant appropriate relief, if it finds that any of them does not fulfill constitutional requirements.

Comment:

To ensure periodic redistricting and reapportionment, this draft section directs the governor to present plans for congressional districting and legislative districting and apportionment to the General Assembly three months after each official United States decennial census. In developing plans to be submitted to the General Assembly, the governor is free to utilize a commission or to consult personally with any experts, voters, or other consultants as he sees fit.

The General Assembly is given the responsibility for adopting plans of districting and apportionment because of the Commission's opinion that the legislative branch of government can most appropriately deal with this issue. Under this recommendation the General Assembly must be convened in special session, if necessary, to consider plans of districting and apportionment, and it may either enact without change the governor's plans or any of them, amend them, or adopt wholly new plans. Should the General Assembly fail to act on any plan within the period specified, however, the governor's plan would become law.

The Commission further recommends that the Supreme Court of Maryland have original jurisdiction to review any plan upon the petition of any eligible voter and be empowered to grant appropriate relief. Thus, the Supreme Court could modify any plan of districting and apportionment, or it could develop a completely new plan. In this way there could be Supreme Court review of the constitutionality of any plans that be-

come law by legislative enactment or of the governor's plans which become law by reason of legislative inaction.

Original jurisdiction, rather than appellate jurisdiction only, is conferred on the state Supreme Court in all districting and apportionment cases so that prompt and final settlement of any constitutional issues involved can be made.

It should be noted that under draft Section 2.10 no plan for legislative districting or apportionment or congressional districting is subject to referendum.

Section 3.04. **District Representation.**

At least one senator, but not more than two senators, shall represent each senatorial district. At least one delegate, but not more than six delegates, shall represent each house district.

Comment:

Under this draft section the General Assembly is given the power to determine whether there will be single-member districts or multiple-member districts for the election of the members of each chamber. This draft section sets a limitation of six delegates from any one house district and of two senators from any one senatorial district. It might be desirable to establish a separate district for each delegate, but this has not proven to be feasible. However, it might be practicable for the General Assembly to provide for single-member districts in the future and this possibility should not be precluded.

LEGISLATORS

Section 3.05. **Qualifications of Legislators.**

To be eligible as a senator or delegate, a person shall be a qualified voter of the State of Maryland at the time of his election or appointment, and shall have been a resident of the State for at least two years immediately preceding his election or appointment. To be eligible as a senator, a person shall have attained the age of twenty-five years, and, to be eligible as a delegate, he shall have attained the age of twenty-one years, at the time of his election or appointment.

Comment:

This draft section sets forth the eligibility requirements of persons seeking election or appointment to the state Senate and the House of Delegates. It provides that a person must be a qualified voter of the State and must have been a resident of the State for at least two years immediately preceding his election or appointment, and that to qualify as a senator, a person must be at least twenty-five years old, and to qualify as a delegate, a person must be twenty-one years old, at the time of his election or appointment.

In the present Constitution the residence requirement for eligibility for election or appointment as a legislator is three years. The Commission's Committee on the Legislative Department recommended a residence requirement of one year, but, by a vote of 12 to 11, the Commission adopted a two-year residence requirement instead. The Commission believes that a residence requirement of two years is sufficient to restrict individuals with no immediate connection with the State and limited knowledge of Maryland affairs from

running for membership in the General Assembly.

It should be noted that under draft Section 2.01 "qualified voter" means an eligible voter who is registered to vote.

Although no requirement that a legislator be a resident of the district from which he is elected is recommended, it is anticipated that candidates will almost invariably be such residents, just as are candidates for seats in Congress. Nevertheless, a majority of the Commission is of the opinion that the electorate of a district should not be precluded from choosing any qualified Marylander whom the electorate believes can best represent it. Some members of the Commission, however, feel very strongly that only a resident of a district should be eligible to represent the district in the General Assembly, but, by a vote of 13 to 7, the Commission rejected this requirement.

As is the case in establishing voter eligibility, minimum age requirements are necessarily arbitrary. The minimum ages of twenty-five and twenty-one prescribed by this draft section are the same as those in the present Constitution and the Commission sees no reason to recommend a change. No one appearing before the Commission suggested any change in these age requirements.

Section 3.06. **Election of Legislators.**

A member of the General Assembly shall be elected by the qualified voters of the legislative district from which he seeks election, to serve for a term of four years beginning on the third Wednesday of January following his election.

Comment:

This draft section continues the present practice of electing both senators and delegates to four-year terms. The Commission is of the opinion that the experience of Maryland during the past eleven years has amply justified the provision of four-year terms for legislators. The Commission is convinced that a legislator who is elected only to a two-year term must give a disproportionate amount of his time, attention and energy to the problems of reelection. By contrast, a six-year term imposes too long a delay before changes in popular sentiment can be reflected in a change in representation.

The Commission's Committee on the Legislative Department recommended that provision be made for staggered terms whereby one-half of the members of each house would be elected to four-year terms every two years. This recommendation was patterned after Article III, Section 7 of the 1867 Constitution as originally adopted which provided for four-year staggered terms for senators. This provision, however, was eliminated by constitutional amendment in 1956. After debate, the Commission rejected the Committee's recommendation by a vote of 15 to 6 and recommends that the terms not be staggered. The principal arguments against staggered terms are that they disrupt the governor's administration and the harmony of his relations with the legislature serving with him; and they also tend to disrupt the legislature itself by requiring its reorganization every second year just as its members are becoming accustomed to working together in a cooperative spirit. The principal arguments for staggered terms are that they make each house more responsive to the electorate, they make a shorter ballot possible and they reduce the term for which vacancies are filled by appoint-

ment. The last advantage, however, has been gained by the recommendation in the next draft section that persons appointed to fill vacancies serve only until the next general election.

Section 3.07. **Vacancies.**

A vacancy in the General Assembly shall be filled by appointment by the governor; provided that the appointee to succeed a party member shall be a member of the same party. The person appointed to fill the vacancy shall serve only until the next general election held more than ninety days after the vacancy occurs, at which election any remaining portion of the unexpired term shall be filled.

Comment:

This draft section sets forth procedures to be used in filling vacancies in the General Assembly. The governor is given the authority to appoint successors with the requirement that a person appointed to succeed a party member must be a member of the same political party as was the incumbent. There is no comparable restriction on the governor in filling a vacancy in a seat theretofore held by an independent. The Commission rejected the suggestion that the governor be required to appoint an independent to succeed an independent, since it is an unwarranted assumption that the views and persuasions of any two independents would be alike.

Persons appointed by the governor to fill a vacancy serve only until the next biennial general election that follows more than ninety days after the vacancy occurs, or until the end of the term, whichever occurs first. It is the Commission's opinion that where the next biennial general election follows within ninety days of the occurrence of a vacancy, there is insufficient time for an orderly nomination of candidates and for them to conduct a meaningful campaign. Where a period longer than ninety days elapses between the vacancy and the next biennial election, the Commission thinks that there is no justification for having a district represented by an appointed rather than by an elected legislator.

The Commission's Committee on the Legislative Department recommended that vacancies in the legislature "be filled as provided by law," which would give the General Assembly the power to determine the method of filling a vacancy in either house. This recommendation was consistent with the philosophy of the Committee that the General Assembly be given as much responsibility as possible by the draft constitution.

The Commission, however, rejected the Committee's recommendation because it considered the composition of the legislative branch so fundamental as to require constitutional coverage.

Section 3.08. **Compensation of Legislators.**

The members of the General Assembly shall receive such salary and allowances as may be prescribed by law.

Comment:

This draft section assigns to the General Assembly the responsibility for establishing by law the compensation and expense allowances to its members. This is a departure from the provisions of the present Constitution, because although an effort was made to amend

the present Constitution to authorize the General Assembly to establish by law the compensation of its members, such amendment was not ratified by the electorate.

As originally adopted in 1867 the present Constitution provided in Article III, Section 15 that each member of the General Assembly should receive compensation of five dollars for each day he attended the session and should receive such mileage as might be allowed by law, not exceeding twenty cents per mile. Efforts were made from time to time to amend this provision of the Constitution so as to increase the per diem allowance of compensation, but all such efforts were uniformly unsuccessful.[66]

Efforts were also made to change the per diem compensation to an annual salary but these efforts were likewise unsuccessful prior to 1942.[67] In 1942, this section of the Constitution was amended to provide that each member of the General Assembly should receive an annual salary of one thousand dollars, with a deduction of fifteen dollars for each day of unexcused absence. There was no change in the provision with respect to the mileage allowance.

The next change became effective January 1, 1949. At that time this section was amended to increase the annual compensation to eighteen hundred dollars.

In 1962, the General Assembly proposed an amendment to increase the annual salary to three thousand dollars, but this was rejected by the electorate. The next amendment became effective January 1, 1965, when the annual compensation was increased to twenty-four hundred dollars. This provision is still in effect.

The most recent amendment, that proposed by Chapter 431 of the Acts of 1966, provided that the compensation of the members of the General Assembly should be as prescribed by law. This was rejected by the electorate in November, 1966.

Although the proposal was recently rejected by the voters, the Commission firmly believes in the soundness of the recommendation that the compensation of legislators be as prescribed by law. As has been noted elsewhere in this Report, the Commission recommends that all provisions in the present Constitution which prescribe salaries of public officials be deleted. The Commission sees no reason to make an exception in the case of the compensation payable to members of the General Assembly. Constitutional restrictions and limitations on the amount of salaries payable to public officials have been unsatisfactory. Not only does the freezing of salary in the Constitution present almost insuperable obstacles to the adjustment of such salaries to meet changing demands on time, changes in the cost of living, and changes in salary standards as reflected by salaries paid by business and industry generally, but such constitutional restrictions make it almost impossible to attract qualified persons to public service.

Those who oppose authorizing the General Assembly to fix the compensation of its own members attempt to draw a distinction between establishing by law compensation of members of the General Assembly and establishing by

[66] Acts of 1920, chapter 319, rejected Nov. 2, 1920; Acts of 1927, chapter 379, rejected Nov. 6, 1928; Acts of 1929, chapter 348, rejected Nov. 5, 1929; Acts of 1931, chapter 185, rejected Nov. 6, 1934.

[67] Acts of 1939, chapter 247, rejected Nov. 5, 1940.

law compensation of other public officials generally. However, this would seem to be a distinction without a difference. Flexibility in adjusting the compensation of legislators is indispensable if service in the General Assembly is to attract highly qualified individuals. For these reasons, the Commission believes the best solution is to authorize the General Assembly to prescribe by law the compensation payable to its own members. The fact that legislators must be reelected every four years provides an ample safeguard against abuse of the power of the General Assembly to set the salary of legislators.

In establishing the compensation of its own members, the General Assembly must act publicly. Not only are the proposed salaries set out specifically in the budget, but they must be prescribed by law. This law, of course, receives the full scrutiny of the public during the enactment process and it is subject to the governor's veto. These should be adequate safeguards against irresponsible or improper action by the General Assembly.

The Commission's Committee on the Legislative Department recommended that the compensation of members of the first General Assembly elected after the adoption of the new constitution be fixed by the Constitutional Convention by means of enabling legislation to be submitted with and adopted by the people at the same time the constitution is adopted. In conjunction with this recommendation, the Committee further recommended that this draft section provide that the General Assembly's power to establish by law the compensation and allowances to its members be limited so that an increase in compensation could be effective only as to future legislatures. It was thought that this would not only prevent members of the General Assembly serving at any time from increasing their own salaries, but would also prevent adjustment of legislative salaries more often than once every four years.

These recommendations were discussed fully, but were rejected by the Commission. The advantage, if any, in providing that the members of any given legislature cannot increase their own salaries is slight in view of the fact that ordinarily eighty to eighty-five per cent of the legislators are reelected. The only effect of the restriction, therefore, would be to delay the General Assembly from one to four years in making salary adjustments.

Section 3.09. **Appointment of Legislators to Other Offices.**

No member of the General Assembly shall, during the term of office for which he was elected or appointed, be appointed to any office which shall have been created, or the salary or profits of which shall have been increased, by the General Assembly during such term.

Comment:

This draft section, similar in effect to Article III, Section 17 of the present Constitution, forbids the appointment of a member of the General Assembly, during the term for which he was elected or appointed, to an office created or rendered more lucrative by the General Assembly during such term. It is also substantially the same as the corresponding provision of Article I, Section 6 of the United States Constitution. It should be noted, however, that in Article III, Section 17 of the present Constitution the prohibition applies to eligibility to an office, and would apply to an office

to which a member of the General Assembly could be elected as well as to one to which he could be appointed. This draft section applies only to offices to which a member of the General Assembly may be appointed, and the same is true in Article I, Section 6 of the United States Constitution.

The need for this historic prohibition is premised upon the thought that the judgment and conduct of legislators should not be affected by potential personal interest in the creation of new offices or in the increase in the compensation of an existing office from which they might personally benefit. The primary argument for not including such a provision in a draft constitution is that the General Assembly should be given the responsibility for policing the ethics and conduct of its own members. Moreover, the maximum effect of the restriction is to forbid a legislator from benefiting from his own legislative action for the duration of the term to which he has been elected or appointed.

The Commission, however, thinks it would be in the public interest to include this restriction in a new constitution since it would serve to curtail legislators from acting primarily for their own immediate benefit. Benefits which are contingent upon future possibilities and risks are not as likely to warp the conduct of legislators as are benefits within their immediate reach.

Section 3.10. **Immunity of Legislators.**

A member of the General Assembly shall not be liable in any civil action or criminal prosecution for any words used in any proceedings of the General Assembly.

Comment:

This draft section is essentially the same as Article III, Section 18 of the present Constitution and is preceded in our tradition by the English Bill of Rights of 1689, the American Articles of Confederation, and Article I, Section 6 of the United States Constitution. The provision guarantees to legislators freedom from liability in any civil action or criminal proceeding for anything said or written on the floor of either house of the General Assembly or in any committee meeting, legislative hearing, or other proceeding of the General Assembly. This grant of immunity is intended to protect members of the legislature from the coercive effect of the fear of a lawsuit, and is thought essential to promote full, free and open debate.

GENERAL ASSEMBLY

Section 3.11. **Size of General Assembly.**

The number of members of each house of the General Assembly shall be as prescribed by law.

Comment:

This draft section authorizes the General Assembly to determine by law the number of members of each house. It must be read in conjunction with draft Section 3.02 providing for districting, draft Section 3.03 providing for redistricting and reapportionment, and draft Section 3.04 prescribing the maximum number of legislators from each district. The four sections read together vest in the General Assembly the power to prescribe by law the legislative districts, the number of legislators to be elected from each district not exceeding the prescribed maximums, and the total number of members of each house.

This draft section represents a change from the practice followed in Maryland prior to 1966. The 1867 Constitutional Convention continued the number and apportionment of the Senate unchanged from the 1864 Constitution with the result that the present Constitution as originally adopted provided that each county and each of the three districts of Baltimore City should have one senator, providing for a Senate of 26 members. In contrast, the Constitution of 1867 specified the number of delegates from each county and from each of the three legislative districts of Baltimore City, for an aggregate of 86 members in the House of Delegates. It was further provided that the specified apportionment should continue only until the publication of the next national census, which was to occur in 1870, or until the enumeration of the population of the State. Thereafter, the House of Delegates was to be apportioned on a basis designed to place a limitation on the total representation that could be given to Baltimore City or to any county. This was to be accomplished by a weighted apportionment.[68] The temporary apportionment provided in the 1867 Constitution was basically the same as that provided by the interim apportionment of the 1864 Constitution, except that representation for smaller counties was doubled from one to two delegates, ending Baltimore City's equality in representation ratios.

Since that time there have been significant amendments to the 1867 Constitution insofar as apportionment is concerned. The constitutional amendments ratified in 1901 gave Baltimore City a fourth legislative district and in 1922 the City was given two additional legislative districts.

To prevent losses of relative strength of the more populous counties to Baltimore City, a constitutional amendment was adopted in 1950, freezing the House of Delegates in its existing size and apportionment as established under the 1940 census. This fixed the size of the House of Delegates at 123 members. The 1950 amendment marked a permanent intensification of the apportionment issue. In subsequent years the legislature repeatedly refused to enact any reapportionment measures; even a relatively mild proposal introduced in 1960 failed to pass either chamber.[69]

The issue finally reached the courts in 1960 with the institution of the suit of *Committee on Fair Representation v. J. Millard Tawes, Governor.*[70] This litigation continued through the Maryland courts for the next two years during which time the General Assembly enacted stop-gap legislation, the constitutionality of which was also contested in the pending litigation. The constitutionality of the apportionment of the Senate and of the stop-gap legislation reapportioning the House of Delegates was upheld by the Court of Appeals

[68] For each county not exceeding 18,000 population, 2 delegates.

For each county over 18,000 but less than 28,000 population, 3 delegates.

For each county of 28,000 but less than 40,000 population, 4 delegates.

For each county of 40,000 but less than 55,000 population, 5 delegates.

For each county of 55,000 or more population, 6 delegates.

For each legislative district in Baltimore City, no more delegates than the number held by the most populous county.

[69] Journal of Proceedings of the Senate of Maryland 220 (February Session 1960); Journal of Proceedings of the House of Delegates 282 (February Session 1960).

[70] Circuit Court of Anne Arundel County. The first opinion of the Court of Appeals is reported in 228 Md. 412 (1961).

and that decision was appealed to the United States Supreme Court.

In reversing the Court of Appeals of Maryland, the United States Supreme Court in 1964 held that the General Assembly of Maryland was malapportioned and that Article III, Section 5 of the present Maryland Constitution and the stop-gap legislation were both in violation of the United States Constitution.[71] Following this decision, the Court of Appeals of Maryland remanded the case to the Circuit Court of Anne Arundel County with instructions to that court to retain jurisdiction of the litigation and enter an appropriate decree in the event the General Assembly failed to enact a constitutionally valid apportionment scheme prior to the 1966 primary elections.

In its regular 1965 session the General Assembly passed no reapportionment legislation. The Governor then convened a special session for the purpose of complying with the mandates of the United States Supreme Court and the Court of Appeals of Maryland. In this special session, two alternate bills were enacted, Senate Bill 5 and Senate Bill 8. Senate Bill 8 contained a provision that if the bill were held constitutionally valid then the Senate Bill 5 should not become effective. Both bills were submitted to the Anne Arundel County Court in *Hughes v. Maryland Committee;*[72] and, on appeal, the Court of Appeals of Maryland held in 1966 that Senate Bill 8 was invalid and unconstitutional, but that Senate Bill 5 was constitutional and valid.[73] Senate Bill 5 is now codified as Article 40, Sections 42, 42A, 42B, 42C, 42D and 42E of the Maryland Code of Public General Laws.

It is this legislation, rather than the present Constitution, which today prescribes the number and apportionment of the members of the Senate and of the House of Delegates. Although the statute is in conflict with the present Constitution of Maryland, the validity of the statute has been upheld on the ground that, since Article III, Section 5 is invalid under the United States Constitution, there is no valid provision in the Constitution of Maryland prescribing the number and apportionment of members of the legislature. Accordingly, the General Assembly, having plenary power to legislate under the Maryland Constitution, has the authority to prescribe the number and apportionment of the members of the General Assembly.[74]

The decisions of the United States Supreme Court have made it clear that the United States Constitution requires that state legislatures be apportioned according to population, that is, pursuant to the "one man, one vote" rule. Since the relative populations of the various districts of the State are constantly changing, any scheme of apportionment must provide for periodic reapportionment. It seems obvious that necessary changes can more readily be made by statute than by constitutional amendment. It is for this reason that the Commission recommends that the power of apportionment and reapportionment be conferred upon the General Assembly.

The Commission's Committee on the Legislative Department recommended

[71] Maryland Committee v. Tawes, 377 U.S. 656 (1964).

[72] The proceeding was the same suit in the Circuit Court of Anne Arundel County, but Senator Harry R. Hughes and others were substituted as defendants.

[73] 241 Md. 471 (1966).

[74] Maryland Committee v. Tawes, 228 Md. 412 (1961).

that limitations on the size of both houses be prescribed in the constitution. It recommended that, after reapportionment following the 1970 census, the number of senators should not exceed 43 and the number of delegates should not exceed 150. Other similar restrictions were discussed by the Commission.

After deliberation the Commission rejected all the suggestions that a maximum size for either house of the General Assembly be prescribed. The optimum size of a house of elected representatives reflects a delicate balance between many factors, such as the size of the population represented, the number of divergent interests present in the electorate, the desirable number for effective debate in a deliberative body, and others. The balance between such factors changes over a period of time and the legislature should have the power to adjust the size of each house accordingly. The Commission recognizes the possibility that the advantages of relatively small houses may succumb to the pressure to increase the number of legislators when a required reapportionment would eliminate the seats of incumbent legislators, but it is of the opinion that reliance must be placed on the General Assembly to take whatever action is appropriate.

The Commission is further of the opinion that the Senate should be approximately one-third the size of the House of Delegates, but it does not believe that the relative sizes of the two houses should be prescribed in the constitution.

Section 3.12. **Legislative Sessions.**

The General Assembly shall convene in regular session on the third Wednesday of January of each year, unless otherwise prescribed by law, and may continue in session for a period not longer than seventy days; provided, however, that by the affirmative vote of three-fifths of all the members of each house a session may be extended for a period not longer than thirty days. The governor may convene a special session of the General Assembly at any time and must convene a special session upon the written request of three-fifths of all the members of each house.

Comment:

This draft section prescribes a date for the General Assembly to convene each year, but permits a different date to be prescribed by law from time to time so that no constitutional amendment is necessary if a change in the date should prove to be desirable. The date prescribed is the same as that now prescribed by Article III, Section 14 of the present Constitution. It should be noted that this is also the same date prescribed in draft Section 4.05 for the governor to take office.

This draft section provides for regular seventy-day annual sessions rather than for alternate short and long regular annual sessions, as was the case under Article III, Section 15 of the present Constitution as it existed between 1948 and 1964.

After considerable debate, the Commission recommends that the length of the regular session continue to be fixed at seventy days because it believes that seventy days is sufficient time for the General Assembly to conduct its business. This belief is reinforced by the recommended draft Article VII which provides that the General Assembly shall not enact local legislation.

It is possible that under unusual conditions a longer time might be needed and, therefore, the draft section pro-

vides that the General Assembly may extend its regular session for an additional period of not longer than thirty days by the affirmative vote of three-fifths of all the members of each house. The draft section is phrased to permit only one extension, even though it be for less than thirty days.

The constitutional limitation on the length of a session of the General Assembly provides an impetus for the prompt and efficient conduct of legislative affairs. In states without such a constitutional limitation, legislative sessions have been known to continue for months without action being completed on any critical bills under consideration. The constitutional limitation also encourages service as legislators by persons whose business pursuits will not permit an absence of indeterminate length.

This draft section authorizes the governor to convene the General Assembly into special session at any time. This provision is essential since critical problems requiring legislative action may arise at any time.

This draft section also provides that the governor must convene the General Assembly upon the written request of three-fifths of the members of each house. Thus, the independence of the General Assembly as a coordinate branch of the government is recognized by conferring upon it the power to convene itself without dependence upon the executive, or even against his wishes.

The Commission's Committee on the Legislative Department recommended that the General Assembly be a continuing body with no constitutional limit as to the length of its sessions. The Committee was of the opinion that the General Assembly itself should determine how long it should sit in order to transact its legislative business, and that such an approach would further tend to strengthen the General Assembly as an independent coordinate branch of the government.

After considerable debate the Commission, by a vote of 13 to 10, rejected this recommendation in the belief that the advantage of having the General Assembly as a continuing body is outweighed by its disadvantage, that it is in the public interest that there be a foreseeable end to each legislative session, that seventy days each year should be ample for the consideration and passage of all necessary statewide legislation, and that without the compulsion of a fixed date for a *sine die* adjournment, legislative action would proceed at a very dilatory pace.

While conceding that a legislature faced with a constitutional deadline for adjournment may have a spur to action, the Committee on the Legislative Department replied that forced action is often precipitous and unwise and pointed to examples of important legislation defeated in recent sessions of the General Assembly by *sine die* adjournment. The Committee therefore requested that an appropriate provision making the General Assembly a continuing body be drafted as an alternate to this draft section. The alternative language recommended by the Commission to accomplish this purpose is as follows:

> The General Assembly shall be a continuing body, meeting in regular annual sessions convening on the third Wednesday of January in each year and terminating as prescribed by law. The governor may convene a special session of the General Assembly at any time.

The Committee on the Legislative

Department had also recommended that there be a provision for a recess instead of *sine die* adjournment at the end of every second regular annual session. This would permit unfinished business of the session concluding with a recess to be considered at resumption of the session in the second year without the necessity of reintroducing bills upon which there had not been final action. The Commission also rejected this recommendation because of its belief that it would not be desirable to carry over a backlog of unfinished business from one session to another, even though this were limited to two-year periods.

Section 3.13. **Organization of General Assembly.**

Each house shall be the judge of the qualifications and selection of its members, as prescribed by this Constitution and the laws of this State. Each house shall elect its own officers and determine its rules of procedure, and may permit its committees to meet between sessions of the General Assembly. Each house may, by the affirmative vote of three-fifths of all its members, compel the attendance and testimony of witnesses and the production of records and papers either before the house as a whole or before any of its committees, provided that the rights and the records and papers of all witnesses, in such cases, shall have been protected by law. No person's right to fair and just treatment in the course of legislative and executive investigations shall be infringed. Each house may punish a member for disorderly or disrespectful behavior and may expel a member by the affirmative vote of three-fifths of all its members.

Comment:

This draft section follows established precedent in permitting each house to judge the qualifications and elections of its members. The constitutions of every state except two, and of the United States, contain similar provisions.[75]

This kind of provision has been interpreted by the courts as vesting in legislatures exclusive jurisdiction to determine the elections and qualifications of their members, so that the courts would have no jurisdiction to determine election disputes with respect to members of the legislature.[76] However, the current validity of this proposition may be questioned in the light of a recent decision of the United States Supreme Court.[77]

The first sentence of this draft section is almost identical to the first clause of Article III, Section 19 of the present Constitution, the difference being that this draft section uses "selection" instead of "election," thus including appointment as well as election.

This draft section additionally recognizes the power of the General Assembly to organize itself for the conduct of its business, and specifically authorizes the General Assembly to permit its committees to meet between sessions. This latter provision would allow committees to make long-range detailed studies and to prepare complementary legislation at a time when the members are not fully occupied with the passage of legislation. The Legislative Council is presently intended to perform this function, but the inclusion of the recommended provision in this draft section would give the General Assembly the authority to continue its regular organization between sessions to discharge these duties.

[75] INDEX DIGEST 662.

[76] Bowling v. Weakley, 181 Md. 496 (1943); Price v. Ashburn, 122 Md. 514 (1914); Covington v. Buffett, 90 Md. 569 (1900).

[77] Bond v. Floyd, 385 U.S. 116 (1966).

This draft section also empowers the General Assembly to compel the attendance and testimony of witnesses, and the production of records and papers, either before the General Assembly as a whole or before any legislative committee. In drafting this provision the Commission attempted to strike an appropriate balance between the legislature's need for information and the need to prevent abuses of the subpoena and investigatory power. Thus, in order to exercise its power to compel the attendance and testimony of witnesses and the production of records, the General Assembly must first by public general law have provided an orderly procedure for the protection of the rights of witnesses and of their records and papers. The Commission believes that these requirements will ensure that the use of subpoenas in legislative hearings will be governed by laws of general applicability which will properly protect the rights of all persons. In the opinion of the Commission this represents the best balance between the need of the legislature to obtain information, and the right of all persons to be secure in their persons and effects from unwarranted legislative prying and snooping, or "fishing expeditions" used for purposes of harassment or intimidation.

Section 3.14. **Quorum.**

A majority of all the members of each house shall constitute a quorum for the transaction of business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner, and under such penalties, as each house may prescribe.

Comment:

This draft section provides that the quorum required for each house to transact business is a majority of all the members of the respective houses. This is similar to Article III, Section 20 of the present Constitution, except that the required quorum under the draft section is a majority of "all the members" instead of a majority of all the members elected, the difference being that in the draft section vacancies are not considered in determining a quorum.

Similar provisions are found in a substantial majority of state constitutions.[78] Such provisions are designed to assure that legislative action will not be taken by a minority which is unrepresentative of the legislature as a whole. At the same time, a number smaller than a quorum may adjourn from day to day, and may compel the attendance of absent legislators. This prevents a majority of the members of the General Assembly from paralyzing it into complete inaction by their absence.

LEGISLATION

Section 3.15. **Form of Laws.**

The style of every law of this State shall be, "Be it enacted by the General Assembly of Maryland"; and the General Assembly shall enact no law except by bill. Every law enacted by the General Assembly shall embrace only one subject, which shall be described in its title. No law, nor section of law, shall be revived or amended by reference to its title or section only; nor shall any law be construed by reason of its title, to grant powers or confer rights which are not expressly contained

[78] INDEX DIGEST 669.

in the body of the act. It shall be the duty of the General Assembly, in amending any article or section of the code or law of this State, to enact the article, section or law as it would read when amended.

Comment:

This draft section in substance is essentially the same as Article III, Section 29 of the present Constitution.

The purposes of the requirement that every law enacted by the General Assembly shall embrace but one subject which must be described in its title have been said to be: "To prevent the Legislature from the enactment of laws surreptitiously; to prevent 'log-rolling' legislation; to give the people general notice of the character of the proposed legislation, so they may not be misled; to give all interested an opportunity to appear before committees of the legislature and to be heard upon the advisability of the proposed legislation; to advise members of the character of the proposed legislation, and to give each an opportunity to intelligently watch the course of the proposed bill; to guard against fraud in legislation, and against false and deceptive titles."[79]

The Commission recognizes that there have been occasions when sound and desirable legislation has been invalidated by the courts because of a technical error in the title, and is also mindful of the fact that the drafting of titles for legislation has, because of this constitutional provision, become a major chore.[80] Nevertheless, the Commission believes that the reasons for requiring a single subject and a descriptive title are still valid and that the requirement is desirable. The absence of such a provision might in some instances make it necessary for a legislator to acquiesce in an undesirable bill in order to secure useful and necessary legislation.

The requirement of the last sentence of this draft section is desirable in order to inform legislators fully as to the effect on existing law of any proposed amendment.

Section 3.16. **Consideration of Bills.**

A bill may originate in either house of the General Assembly and be altered, amended, passed, or rejected by the other. Except during the first two days of a special session, no vote on final passage of a bill shall be taken until the bill shall have been printed in final form nor until the third calendar day after introduction.

Comment:

This draft section assures that any legislation may be introduced in either house and that the house in which legislation does not originate has complete freedom to act upon such legislation in whatever way it sees fit. This section closely follows Article III, Section 16 of the present Constitution.

In order to prevent legislation from being enacted hastily or without adequate public notice, this draft section would also prevent a final vote on a bill

[79] Painter v. Mattfeldt, 119 Md. 466, 473-74 (1913).

[80] Title of Acts of 1927, chapter 359, providing for construction of roadways, sewers, etc., in Chestertown, was held to be defective for failure to refer to the creation of a special commission. Culp v. Comm'rs of Chestertown, 154 Md. 620 (1928). Title of Acts of 1906, chapter 804, to authorize the Board of Public Works to collect the insurance upon certain state tobacco warehouses and to rebuild a modern warehouse, held insufficient. Christmas v. Warfield, 105 Md. 530 (1907).

until it has been printed in final form and until the third calendar day after it is introduced. The three-day requirement does not apply in the case of a special session because such a session is usually limited in duration and scope and is called to consider specific legislation. The calling of the special session and its purpose have been well publicized, and the legislators and the public generally are likely to be entirely familiar with the purpose of the session and the legislation to be considered. The elimination of the three-day requirement for a special session permits the General Assembly in such situations to act without delay and adjourn promptly.

Section 3.17. **Journal and Passage of Bills.**

Each house shall keep a current, daily journal of its proceedings which shall be open to public inspection at all times and shall be published as soon as practicable. No bill shall be enacted nor shall a resolution requiring the action of both houses be adopted, unless it is passed in each house by a majority of all the members of that house. A vote in joint session or by either house on any bill or resolution shall be taken only in public session. On final passage of a bill, including a bill proposing a constitutional amendment, or a resolution, the vote cast by each member shall be recorded in the journal of the house of which he is a member.

Comment:

This draft section incorporates some of the provisions found in Article III, Sections 21, 22 and 28, and Article XIV, Section 1 of the present Constitution, and adds other requirements not included in the present Constitution. The purpose of the section is to ensure that the proceedings of the General Assembly shall be conducted in public and that the essential acts of the General Assembly shall be duly recorded so as to be available for public inspection at all times.

A journal is required as the official record of the effective action of each house and is required to be open for public inspection and to be promptly published. The requirement that the votes cast by each legislator on final passage of every measure shall be recorded in the journal makes it possible for the electorate to know how its representatives voted.

This draft section also provides that the passage of every bill or resolution requires the favorable vote of a majority of the members of each house, thus disregarding vacancies in legislative membership in computing the required majority. This provision differs from Article III, Section 28 of the present Constitution which requires the affirmative vote of a majority of the whole number of members elected.

The Commission's Committee on the Legislative Department recommended that each house be authorized to enact measures upon the favorable action of a majority of those members present and voting when a quorum is in attendance. The Committee was of the opinion that the requirement that measures can only be enacted upon the favorable vote of a majority of the members of each house was too restrictive and would hinder the ordinary conduct of legislative business. This opinion was based upon the experience in the General Assembly of Maryland where the requirement of a "constitutional majority" has frequently been used to prevent the enactment of desirable legislation. The Committee noted that its recommendation con-

forms to the present legislative procedure of the United States Congress.

The Commission rejected the Committee's recommendations because it felt that the historic Maryland practice of requiring every measure to be enacted by a majority of all the members of each house has proven valuable in assuring the attendance of almost all members of each house at all legislative sessions. Although the Commission recognized that there may be occasions when only a bare majority of the membership of either house is assembled to transact business and that final action on any measure under these circumstances would require the favorable vote of almost every member present, the infrequency of such extraordinary occurrences does not justify changing the requirement for the vote of a majority of the entire membership for official legislative action.

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ALTERNATIVE DRAFT OF ARTICLE III FOR UNICAMERAL GENERAL ASSEMBLY

The following is the alternative draft article for the legislative branch based upon the General Assembly being a unicameral body. This draft is referred to in the last sentence of the first paragraph of the introductory comment on Article III.

The term "senator" is used throughout this draft article based upon a unicameral legislature to designate a member of the General Assembly.

It has been suggested that the General Assembly be called the Senate and it has also been suggested that a member of the body be called a representative, a legislator, a delegate or an assemblyman.

Section 3.01. *Legislative Power.*

The legislative power of the State is vested in the General Assembly, which shall consist of one house, the members of which shall be called senators.

DISTRICTS

Section 3.02. *Legislative Districts.*

The State shall be divided by law into districts for the election of members of the General Assembly. Each district shall consist of compact and adjoining territory, and the ratio of the number of senators in each district to the population of such district shall be as nearly equal as practicable.

Section 3.03. *Redistricting.*

Within three months after official publication of the population figures of each decennial census of the United States, the governor shall present to the General Assembly plans of congressional districting and legislative districting and apportionment. If the General Assembly is not in session, the governor shall convene a special session. The General Assembly shall by law enact plans of congressional districting and legislative districting and apportionment. If no plan has been enacted for any one or more of these purposes within four months prior to the final date for the

filing of candidates for the next general election occurring after publication of such census figures, then the pertinent plan as presented to the General Assembly by the governor shall become law. Upon petition of any qualified voter, the Supreme Court shall have original jurisdiction to review the congressional districting and legislative districting and apportionment of the State and grant appropriate relief, if it finds that any of them does not fulfill constitutional requirements.

Section 3.04. *District Representation.*

At least one senator, but not more than six senators, shall represent each legislative district.

SENATORS

Section 3.05. *Qualification of Senators.*

To be eligible as a senator, a person shall be a qualified voter of the State of Maryland at the time of his election or appointment, shall have been a resident of the State for at least two years immediately preceding his election or appointment, and shall have attained the age of twenty-one years at the time of his election or appointment.

Section 3.06. *Election of Senators.*

A senator shall be elected by the qualified voters of the legislative district from which he seeks election, to serve for a term of four years beginning on the third Wednesday of January following his election.

Section 3.07. *Vacancies.*

A vacancy in the General Assembly shall be filled by appointment by the governor; provided that the appointee to succeed a party member shall be a member of the same party. The person appointed to fill the vacancy shall serve only until the next general election held more than ninety days after the vacancy occurs, at which election any remaining portion of the unexpired term shall be filled.

Section 3.08. *Compensation of Senators*

The senators shall receive such salary and allowances as may be prescribed by law.

Section 3.09. *Appointment of Senators to Other Offices.*

No senator shall, during the term of office for which he was elected or appointed, be appointed to any office which shall have been created, or the salary or profits of which shall have been increased, by the General Assembly during such term.

Section 3.10. *Immunity of Senators.*

A senator shall not be liable in any civil action or criminal prosecution for any words used in any proceedings of the General Assembly.

GENERAL ASSEMBLY

Section 3.11. *Size of General Assembly.*

The number of members of the General Assembly shall be prescribed by law.

Section 3.12. *Legislative Sessions.*

The General Assembly shall convene in regular session on the third Wednesday of January of each year, unless otherwise prescribed by law, and may continue in session for a period not longer than seventy days; provided, however, that by the affirmative vote of three-fifths of all the senators a session may be extended for a period not longer than thirty days. The governor may convene a special session of the General Assembly at any time and must convene a special session upon the written request of three-fifths of all the senators.

Section 3.13. *Organization of General Assembly.*

The General Assembly shall be the judge of the qualifications and selection of its members, as prescribed by this Constitution and the laws of this State. The General Assembly shall elect its own officers and determine its rules of procedure, and may permit its committees to meet between sessions of the General Assembly. It may, by the affirmative vote of three-fifths of all the senators, compel the attendance and testimony of witnesses and the production of records and papers either before the General Assembly as a whole or before any of its committees, provided that the rights, and the records and papers, of all witnesses, in such cases, shall have been protected by law. No person's right to fair and just treatment in the course of legislative and executive investigations shall be infringed. The General Assembly may punish a senator for disorderly or disrespectful behavior and may expel a senator by the affirmative vote of three-fifths of all the senators.

Section 3.14. *Quorum.*

A majority of all the senators shall constitute a quorum for the transaction of business; but a smaller number may adjourn from day to day, and may compel the attendance of absent senators, in such manner, and under such penalties, as the General Assembly may prescribe.

LEGISLATION

Section 3.15. *Form of Laws.*

The style of every law of this State shall be, "Be it enacted by the General Assembly of Maryland"; and the General Assembly shall enact no law except by bill. Every law enacted by the General Assembly shall embrace only one subject, which shall be described in its title. No law, nor section of law, shall be revived or amended by reference to its title or section only; nor shall any law be construed, by reason of its title, to grant powers or confer rights which are not expressly contained in the body of the act. It shall be the duty of the General Assembly, in amending any article or section of the code or laws of this State, to enact the article, section or law as it would read when amended.

Section 3.16. *Consideration of Bills.*

Except during the first two days of a special session, no vote on final passage of a bill shall be taken until the bill shall have been printed in final form nor until the third calendar day after introduction.

Section 3.17. *Journal and Passage of Bills.*

The General Assembly shall keep a current, daily journal of its proceedings which shall be open to public inspection at all times and shall be published as soon as practicable. No bill shall be enacted, nor shall a resolution be adopted, unless it is passed by a majority of all the senators. A vote on any bill or resolution shall be taken only in public session. On final passage of a bill, including a bill proposing a constitutional amendment, or a resolution, the vote cast by each senator shall be recorded in the journal.

ARTICLE VIII. GENERAL PROVISIONS

Section 8.08. *Impeachment.*

The General Assembly shall have the sole power of impeachment of elected officials, judges, and any other state officers who may be designated by law, in cases of serious crime or serious misconduct in office. The affirmative vote of three-fifths of all the senators shall be required to impeach. Impeachments shall be tried by a special tribunal of ten

judges appointed by the Supreme Court from among the judges of the State. The concurrence of three-fifths of the judges of the special tribunal shall be required to convict. Judgment upon conviction shall be removal from office and may include disqualification from holding any office of public trust, as well as deprivation of pension rights and other privileges of office. A person tried upon impeachment, whether or not convicted, shall be liable to criminal prosecution and punishment according to law.

ARTICLE IV. EXECUTIVE BRANCH

Introductory Comment:

Early in its deliberations the Commission concluded that one of its guiding objectives should be the strengthening of each of the independent, coordinate branches of government. In keeping with this objective, the Commission, in the draft article on the executive branch, seeks to provide the State with an executive branch which is capable of effective and responsible leadership. The following statement from the report of the first "Hoover Commission" is representative of the Commission's viewpoint:

> "Responsibility and accountability are impossible without authority—the power to direct. The exercise of authority is impossible without a clear line of command from the top to the bottom, and a return line of responsibility from the bottom to the top."[81]

The establishment of an executive branch with responsibility, accountability and authority requires that primary attention be given to strengthening the office of governor. This draft article would create a strong, responsible chief executive by removing from the present Constitution a number of obstacles to effective executive control and by increasing the governor's administrative control over the principal policy-makers within the executive branch.

In effect, the present Constitution establishes a plural executive. The governor, comptroller and attorney general are all required to be popularly elected and each has constitutionally specified duties. The treasurer of the State is elected by the General Assembly and also has constitutionally specified duties. The governor, comptroller and treasurer constitute the Board of Public Works which is the principal administrative organization established by the present Constitution, although the Board's primary function today is to exercise those powers conferred upon it by statutes rather than those prescribed by the Constitution. The election of executive officials, either by popular election or by the General Assembly, and their membership on a board exercising the powers presently exercised by the Board of Public Works interfere both with the line of command and the line of responsibility between members of the executive branch, and weaken the authority of the governor as the chief executive.[82]

Former Governors William Preston Lane, Jr., Theodore R. McKeldin and J. Millard Tawes met with the Commission and each testified that in his opinion the comptroller should be appointed by the governor and should not be popularly elected. Governor McKeldin favored the election and Governor Tawes the appointment of the attorney general while Governor Lane did not express a preference.[83] Subsequently, Governor Tawes, while reaffirming his

[81] U. S. Commission on the Organization of the Executive Branch of Government, General Management of the Executive Branch 1 (1949).

[82] "The greatest single impediment to executive unity lies in the constitutional designation of top officials who obtain office by popular election or by legislative election." Rich, State Constitutions: The Governor 13 (National Municipal League 1960).

[83] XIII(3C) Proceedings of the Maryland Constitutional Convention Commission 1966, Hearing of Feb. 24, 1966, 5, 8 (hereafter cited as "Testimony by Governor Lane") (unpublished papers of the Commission in Enoch Pratt Library, University of Maryland Library, Maryland State

opinion that the office of comptroller should not be an elective office, publicly expressed some uncertainty as to whether the attorney general should be elected or appointed.

After full consideration, the Commission concluded that neither the office of attorney general nor the office of comptroller should be created by the constitution. It was the Commission's opinion that these or similar offices would no doubt continue to exist because of the importance of their functions, but that they should be created and their functions prescribed by statute.

Thereafter, in the course of its continued deliberations, the Commission held another hearing at which the present comptroller testified that in his opinion the chief fiscal officer of the State should continue to be popularly elected.[84] He said that this would ensure that at least one public official charged with responsibility for fiscal matters would be directly responsible to the voters, thus providing a system of checks and balances within the executive branch of government. The comptroller also presented to the Commission a prepared statement outlining his views in detail.[85]

The Commission, after studying the comptroller's statement and testimony and again weighing the arguments for and against retaining the office of comptroller as an elective office prescribed by the constitution, voted 14 to 2 not to do so.

In addition to his *ex officio* membership on numerous boards and commissions, the comptroller performs four principal classes of functions. First, as the person generally superintending the fiscal affairs of the State, the comptroller is required to perform many functions of a purely administrative character with respect to the management of the revenue, the support of public credit, the keeping of accounts, and the promulgation of standard forms. Second, he is a tax collector, not only directly collecting the taxes producing the largest revenue of the State, but also superintending the collection of taxes and other revenues by other collectors. Third, he authorizes the payment by the treasurer of all sums paid out of the treasury. Fourth, he supervises post-audit review by the state auditor.

It is quite clear that the first two of these primary functions should be exer-

Library, Johns Hopkins University Library).

XIII(3B) Proceedings of the Maryland Constitutional Convention Commission 1966, Hearing of Feb. 24, 1966, 9, 10 (hereafter cited as "Testimony by Governor McKeldin") (unpublished papers of the Commission in Enoch Pratt Library, University of Maryland Library, Maryland State Library, Johns Hopkins University Library).

XIII(3A) Proceedings of the Maryland Constitutional Convention Commission 1966, Hearing of Feb. 24, 1966, 10 (hereafter cited as "Testimony by Governor Tawes") (unpublished papers of the Commission in Enoch Pratt Library, University of Maryland Library, Maryland State Library, Johns Hopkins University Library).

[84] XV(5) Proceedings of the Maryland Constitutional Convention Commission 1966, Hearing of Nov. 17, 1966, 7-23, 42-72 (hereafter cited as "Testimony by Comptroller Goldstein") (unpublished papers of the Commission in Enoch Pratt Library, University of Maryland Library, Maryland State Library, Johns Hopkins University Library).

[85] XI Proceedings of the Maryland Constitutional Convention Commission 1966, Meeting of Dec. 3, 1966, 193-200 (unpublished papers of the Commission in Enoch Pratt Library, University of Maryland Library, Maryland State Library, Johns Hopkins University Library).

cised under the direct authority of the chief executive, and there would seem to be little, if any, justification for having them performed by an elected official. The arguments in favor of having the third function performed under the direct authority of the chief executive are also strong; although, it can be argued that control of the actual disbursement of state funds should not be in the chief executive.

A strong argument can be made that the fourth function should not be performed by any person in the executive branch, but that it should be performed by an official who is completely independent of the executive branch. This does not mean, however, that such an official must be a person elected by and responsible only to the voters. To the contrary, reason would seem to dictate that, if the post-audit review function is to be separately performed, it should be performed by a person either appointed or elected by, and responsible only to the legislative branch.[86] In the federal government the United States Comptroller General, who performs the post-audit review function, is accountable principally to the Congress; although, he is initially appointed by the President with the approval of the Senate.[87]

The Commission recognizes the need for reorganizing the present administrative structure with respect to the fiscal affairs of the State. It believes that this reorganization can best be accomplished through legislation and should not be rigidly structured in the constitution.

In the early meetings of the Commission it was argued that the constitution should provide for the popular election of the attorney general to ensure his independence. It was argued to the contrary, however, that the prominence and prestige of the position of attorney general as the chief legal officer of the State and the professional reputation of the lawyer filling the office would be sufficient safeguards to ensure his independence.

Apparently, the fear that an appointed attorney general would lack independence arises from the fear that he would be so much a part of the executive branch of government that he could not impartially advise the members of the legislative branch; but if there is any real basis for such concern, the answer would seem to be for the legislative branch to provide for its own separate legal counsel, which it could do by statute.[88] In any event, the Commission believes that the advantages of having the attorney general appointed by the governor far outweigh any disadvantages.[89]

Some persons have argued that the constitution should provide for the elec-

[86] This is the procedure followed in several states; the person performing the function may be designated as either "auditor" or "comptroller." INDEX DIGEST 45, 102.

[87] 42 Stat. 25 (1921), 31 U.S.C. section 53 (1954); 42 Stat. 23 (1921), 31 U.S.C. section 42 (1954). However, he may be removed only by the Congress (subject to exception in the case of any person appointed after January 1, 1966, who prior to his appointment had been subject to the provisions of the Civil Service Retirement Act). 42 Stat. 23 (1921), 31 U.S.C. section 43 (1954), amended by, 80 Stat. 329 (1966), 31 U.S.C.A. section 43 (Supp. 1966).

[88] In the absence of any constitutional restriction against the employment of such counsel, and there is none in this draft constitution, the legislative branch would be acting within its inherent plenary legislative power in enacting such a statute. See draft Section 3.01 and commentary thereon.

[89] Several state constitutions provide that the governor shall appoint the attorney general subject to the advice and consent of the Senate. INDEX DIGEST 35.

tion of both the attorney general and the comptroller, and have argued against the Commission's recommendation that the governor and lieutenant governor be the only statewide officials whose election is prescribed by the constitution. In 1953 the Commission on Administrative Organization of the State ("Sobeloff-Stockbridge Commission"), Maryland's "Little-Hoover Commission," expressly recommended that the attorney general be appointed by the governor and impliedly indicated that the comptroller should be similarly selected. The summary and final report of that Commission expressly recommended that the attorney general should be appointed by the governor and that the comptroller and the treasurer should both be treated as a part "of the executive branch and should report to and be responsible to the governor, instead of being executive officers to a large degree independent of the chief executive."[90]

In Maryland, with three exceptions, the governors elected during the past fifty years had served previously either as attorney general or as comptroller.[91] Some have argued that by having to run for election on a statewide basis, both the comptroller and the attorney general are exposed to the electorate of the State before becoming candidates for governor, and that this has proven advantageous and desirable from the point of view of both the candidate and the electorate.

In some states the attorney general and the officer corresponding to comptroller are appointed; in others they are elected. The functions and duties of these officers vary widely from state to state, but a full description of the practice in each state may be found in the BOOK OF THE STATES.[92]

The Commission recommends that neither the office of attorney general nor the office of comptroller be provided for in the constitution. To the extent that either of these positions is provided for by statute and the holder of the position is designated as the head or chief administrative officer of a principal department within the executive branch (see draft Section 4.19), he will be appointed by and serve at the pleasure of the governor (see draft Section 4.20). This result will not follow if the offices of attorney general or comptroller, or similar offices, created by statute, should be assigned by the General Assembly to departments within either the judicial or the legislative branches.[93]

Although not recommended by the Commission, the State Law Department could be designated by the General Assembly as a principal department within the judicial branch. In this event, under draft Section 4.22 the attorney general, as the head of the department, would be either appointed or elected as might be prescribed by law.

Similarly, although it is most unlikely that any of the functions of the comp-

[90] TWELFTH REPORT OF THE [MARYLAND] COMMISSION ON ADMINISTRATIVE ORGANIZATION OF THE STATE 26, 30 (1953).

[91] The three exceptions are former Governors Harry W. Nice (1935-1939) and Theodore R. McKeldin (1951-1959), and present Governor Spiro T. Agnew.

[92] XVI COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 1966-67, 129 (1966) (hereafter cited as THE BOOK OF THE STATES).

[93] Draft Sections 4.20 and 4.22 do not require heads of principal departments within the legislative or judicial branches, as distinguished from those within the executive branch, to be appointed by the governor; rather, they provide that the General Assembly may prescribe by law for their appointment and removal.

troller except the post-audit review function would be placed anywhere except in the executive branch, it would, as pointed out above, be entirely logical to vest this function in some department included in the legislative branch. In such event, the head of the department would, under draft Section 4.22, be appointed and removed, or be elected, as prescribed by law.

By the same token, if the legislature believed that it should have its own separate legal counsel, it could provide for such counsel within the legislative branch by law and he would be subject to appointment and removal, or election, by the legislature as prescribed by law.

The import of the Commission's recommendation is that, to the extent the functions of either of these officials, or of their respective departments, are functions which are properly exercisable as a part of the executive branch of government, they should be exercised under the authority and direction of the governor as the chief executive; and the officials performing such functions should be subject to appointment and removal by the governor.

A system of checks and balances should operate between branches of government for the people's protection; a system of checks and balances within one branch of government is inappropriate for governmental efficiency. Neither the comptroller nor the attorney general is, in the exercise of his primary function, a policy-maker. The principal qualifications for both positions are technical ability and expertise. Of these the governor is in a better position to judge than the voters.

The draft article does not mention other elected or appointed officials or boards that are provided for in the present Constitution. These include the secretary of state (Article II, Section 22); treasurer (Article VI, Section 1); state's attorneys (Article V, Section 7); adjutant general (Article IX, Section 2); justices of the peace (Article IV, Section 42); sheriffs (Article IV, Section 44); coroners, elisors and notaries public (Article IV, Section 45); surveyors (Article VII, Section 2); county commissioners (Article VII, Section 1); Treasury Department (Article VI); and Board of Public Works (Article XII, Section 1 and Article III, Section 34).

Any of these officers who are heads of principal departments within the executive branch, as for instance, the secretary of state, will be subject to the provisions of draft Section 4.20; and any who are not heads of principal departments within the executive branch, or who are included within either the judicial or legislative branches, as for example, state's attorney, adjutant general, sheriffs, and notaries, will be appointed, or elected, as is prescribed by law. County commissioners, being officers of local government, are covered by draft Article VII.

The omission of these offices from the constitution will promote efficient organization and administration, increase the flexibility of the entire administrative arrangement, and permit effective administrative reorganization without constitutional amendment as the need arises. As a further result of these recommendations, the governor and lieutenant governor provided for in this draft article are the only statewide officers elected by popular vote.

Because of the importance of the Board of Public Works in the present administration of the executive branch, the Commission gave special attention

to the question of whether the Board should retain its constitutional status. The Board is created and its constitutional powers are defined in Article XII and in Article III, Section 34 of the present Constitution.

It should be noted that few, if any, of the constitutional functions of the Board under Article XII remain today. The "public works" or "works of internal improvement" referred to in Article XII were originally railroads, canals, turnpikes and similar public facilities owned and operated by private corporations, but in many instances supported either by means of substantial loans or by purchases of capital stock by the State. The State, therefore, had a large financial interest, either as stockholder or as creditor, in such corporations. The principal constitutional function of the Board of Public Works was that of safeguarding and protecting these investments of the State.

However, the State no longer has investments in private corporations operating "public works" or "works of internal improvement"; and, therefore, the only constitutional function still exercised by the Board of Public Works is that provided for in Article III, Section 34 of the present Constitution. This section deals with public debt and authorizes the Board in certain circumstances to borrow money in anticipation of the collection of taxes to meet temporary deficiencies in the treasury.

The Board of Public Works today, however, performs numerous other functions, such as:

1. To fix interest rates on and to sell state bonds.

2. To let contracts for the expenditure of state funds (except in connection with state highway projects).

3. To approve or disapprove leases.

4. To promulgate rules and regulations covering business administration in the various state agencies.

5. To sell real or personal property of the State.

6. To transfer property from one governmental agency to another.

7. To approve or disapprove the creation of new jobs not in the budget.

It should be emphasized that all of these functions are statutory. They could just as well be conferred upon a board of public works created by statute as upon a board of public works created by the constitution.

There may indeed be a justification for vesting these powers in a three-man board, two of the members of which are to some degree, at least, independent of the governor. It may also be argued that to vest such powers in an independent board is to impose an unwarranted restriction upon the governor as the chief executive of the State. However, the question need not be resolved in the constitution.

The General Assembly, under the Commission's recommendations, can provide by statute for these powers to be exercised by a board constituted as prescribed by statute, in the same manner as is today prescribed by statute with respect to the Board of Public Works. On the other hand, it is certainly true today that the vast majority of decisions made by the Board of Public Works is not of major importance.

The Board is called upon to give approval to literally thousands of small transactions with regard to which it is difficult for the Board to make informed decisions. It would appear that a high

level board of this character is not required for the purpose of making such decisions, and that an appropriate official or agency should have the authority to take final action. The present requirement of Board approval can act as a bottleneck. Since the number of items requiring attention is great, each item encounters considerable delay before being placed on the agenda.

The present comptroller stated to the Commission that in his opinion the Board should be retained in its present form; but former Governors Lane, McKeldin and Tawes all concurred in the opinion that consideration should be given to reorganizing the Board of Public Works. As pointed out above, reorganization is an executive and statutory function, the performance of which is facilitated by omitting from the constitution all reference to the Board of Public Works.

This draft article not only removes existing obstacles to effective administrative control, but it also gives the governor new management aids. First, there is a provision for the election of a lieutenant governor as an official assistant to the governor. The Commission recommends that the lieutenant governor run with the governor for election as a team, and that the lieutenant governor be delegated duties by the governor and by law. The provision for a popularly elected lieutenant governor will neither conflict with, nor reduce the governor's administrative control over the executive branch, but it will establish an official assistant to whom the governor may delegate some of his ever-increasing duties.

Second, there is a provision authorizing the governor to appoint and to remove the policy-making heads of most of the principal executive departments. Under this provision the governor will be able to appoint those persons to primary executive positions in whom he has full confidence, and he will be able to remove from such primary executive positions any persons whose performance is unsatisfactory to him. This provision is recommended because the governor is the person ultimately responsible to the electorate for the administration of every department within the executive branch.

Third, there is a provision empowering the governor to take the initiative in administrative reorganization. Although any proposed administrative reorganization would be subject to legislative approval, this authority would facilitate the implementation of needed reorganization of the executive branch.[94]

The Commission also considered whether the constitution should specify the governor's salary and place of residence while in office. Article II, Section 21 of the present Constitution provides that the governor shall reside at the seat of government and shall receive an annual salary of $25,000.

The Commission believes that a provision requiring the governor to reside at the seat of government serves little or no useful purpose and might occasion difficulties.[95] Governors will undoubtedly continue to reside in Annapolis because

[94] See draft Section 4.19.

[95] In Gallagher v. Board of Education, 219 Md. 192 (1959), it was argued that Theodore R. McKeldin, who sought to run for mayor of Baltimore City within one year of the expiration of his second term as governor, did not meet a ten-year residency requirement because Article II, Section 21 compelled him to abandon his legal residence in Baltimore City. The Court held that, notwithstanding Article II, Section 21, he had remained a legal resident of Baltimore City during his eight years as governor.

of tradition, the availability of Government House and because it promotes the expeditious handling of state business, particularly while the legislature is in session. The Commission recommends, however, that there be no provision in the constitution specifying a place of residence for the governor.

The disadvantages of placing a constitutional ceiling on the governor's salary are clearly indicated by the State's experience. Article II, Section 21 of the 1867 Constitution fixed the governor's salary at $4,500. This amount was continued as the prescribed salary in the Constitution until 1955—long after it had become grossly inadequate.

In 1955 the Constitution was amended to increase the governor's salary to $15,000. This amendment became effective in January, 1959. In 1966 the Constitution was again amended to increase the governor's salary to $25,000.

In accordance with its recommendation stated elsewhere in this Report that all provisions in the present Constitution which prescribe salaries of public officials be deleted, the Commission recommends that no salary for the governor be prescribed in the draft constitution.

Section 4.01. **Executive Power.**

The executive power of the State is vested in the governor, who shall be responsible for the faithful execution of the laws.

Comment:

This draft section establishes the executive branch as one of the three independent coordinate branches of the state government. It vests executive power of the State in the governor who has full responsibility for the exercise of this power and for the faithful execution of the laws. The language of the draft section is the traditional language of Article II, Sections 1 and 9 of the present Constitution.

Section 4.02. **Duties of Lieutenant Governor.**

There shall be a lieutenant governor who shall perform such duties as may be prescribed by law and such other duties as may be delegated to him by the governor.

Comment:

This draft section creates an office of lieutenant governor but does not specify the duties of the office. The lieutenant governor will be a popularly elected "assistant governor," performing those functions which the governor assigns to him or which are prescribed by law. It should be noted that this draft section does not provide that the lieutenant governor is to be an *ex officio* president of the Senate, as many state constitutions provide.[96]

The creation of the office of lieutenant governor will permit the orderly succession to the office of governor in the event of the death or disability of the incumbent governor. It will provide the governor with an official representative to whom he can delegate some of his ever-increasing duties. The office of lieutenant governor can provide an opportunity for political exposure to persons desirous of eventually seeking the office of governor in lieu of the opportunities which would be removed by not providing in the constitution for the election of an attorney general and a comptroller.

[96] INDEX DIGEST 659.

Former Governors William Preston Lane, Jr. and J. Millard Tawes each testified that in his opinion a lieutenant governor would be useful.[97]

The office of lieutenant governor last existed in Maryland between 1864 and 1867. The Constitution of 1864 created the office of lieutenant governor and prescribed that he should act as president of the Senate, cast the deciding vote whenever the Senate was equally divided, and succeed to the office of governor whenever a vacancy should occur in that office. The articulated reasons for creating the office of lieutenant governor in 1864 were to give the government an additional popularly elected figure and to emulate the majority of other states.[98]

GOVERNOR AND LIEUTENANT GOVERNOR

Section 4.03. **Governor.**

To be eligible for election as governor, a person shall have attained the age of thirty years at the time of his election, and shall have been a qualified voter in the State for at least two years immediately preceding his election. No person elected governor for two full consecutive terms shall be eligible to hold that office again until one full term has intervened.

Comment:

This draft section requires that a person must have attained the minimum age of thirty years to be eligible for election as governor. This requirement is the same as that in Article II, Section 5 of the present Constitution. It is also the same requirement which thirty-five other states have in their state constitutions.[99]

The Commission recommends that to be eligible for election as governor a person must have been a qualified voter of the State for at least two years immediately preceding his election. Under draft Section 2.01 a "qualified voter" means a registered voter, and under that same section, to be a registered voter one must be a citizen of the United States and must have been a resident of the State for at least six months. The two-year period overlaps the six months' period and the effect of the draft section, therefore, is to require that one seeking election as governor have been a resident of the State for at least two years. The Commission believes that this residency requirement is sufficient to assure that any person who seeks the office of governor has had an opportunity to become familiar with the State, its people and its problems.

This provision differs from the present Constitution which provides that the governor must have been a citizen of the State for ten years and a resident for five years immediately preceding his election. These requirements in the present Constitution were rejected by the Commission because they were considered too restrictive. The ten-year citizenship requirement is the longest imposed by any state, and was apparently placed in the Constitution of 1867 to prevent Negroes from being eligible for the office.[100] The Commission was of the

[97] Testimony by Governor Lane 5, 8. Testimony by Governor Tawes 12-13.

[98] The Debates of the Constitutional Convention of 1864 of the State of Maryland 1316-21 (1864).

[99] Index Digest 56.

[100] Perlman, Debates of the Maryland Constitutional Convention of 1867, 179 (1923).

opinion that a ten-year residency requirement is too long in light of the increased mobility of today's population.

In addition, the concepts of "citizenship" and "residency" are difficult to define. The first sentence of the Fourteenth Amendment to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Residency poses a difficult question of fact. Because of the difficulty in defining "citizenship" and "residency," the Commission recommends that any residency requirement be defined in terms of the registration of a voter. Registration is a matter of public record and can be easily established.

This draft section prohibits a governor from serving three consecutive terms. This restriction is the same as that in Article II, Section 1 of the present Constitution, and dates from a 1948 amendment. This draft section permits any person who has served two consecutive terms as governor again to be elected governor after a full four-year term has intervened.

This draft section does not restrict a person quite as much as does the Twenty-Second Amendment to the United States Constitution, which provides:

> "No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. . . ."

The question of whether the number of terms to which a person may be elected governor should be prescribed in a constitution is a difficult one. Any prescribed limitation would restrict the people's choice of persons they could elect governor by eliminating from a gubernatorial contest any candidate who had just served two terms as governor. This would remove from the election the candidate who would be most familiar to the voters and deny them an opportunity to pass judgment at the polls on the immediate past governor's administration.

Conversely, political experience indicates that it is often difficult to defeat an incumbent governor who is seeking reelection even though he may not be the most qualified candidate. It has been argued that a two-term restriction upon a governor's tenure offers the best protection against "bossism."

Former Governors Lane, McKeldin and Tawes testified that they favored a two-term limitation upon a governor's tenure.[101]

After full deliberation, the Commission recommends that a two-term limitation be prescribed in the constitution.

[101] Testimony by Governor Lane 3-4. Testimony by Governor McKeldin 3-4. Testimony by Governor Tawes 4-5.

Section 4.04. **Lieutenant Governor.**

To be eligible for election as lieutenant governor, a person shall have attained the age of thirty years at the time of his election, and shall have been a qualified voter in the State at least two years immediately preceding his election. No person elected governor for two consecutive terms shall be eligible to hold the office of lieutenant governor until one full term has intervened.

Comment:

This draft section requires that to be eligible for election as lieutenant governor, a person must meet the same requirements as are specified in draft Section 4.03 for persons seeking the office of governor. The Commission recommends that since the purpose of the office of lieutenant governor is to have a person in a position to assume the office of governor if necessary, the qualifications for the office of lieutenant governor should be identical to those specified for the Governor.

The Commission recommends that no incumbent governor who is serving his second consecutive term be eligible to seek the office of lieutenant governor until one full term has intervened between his leaving office and the occasion of his seeking such election. This provision would prevent the circumvention of the limitation in draft Section 4.03 which denies incumbent governors the right to seek a third consecutive term of office. The omission of such a provision would permit an incumbent governor to seek election as lieutenant governor and, upon his election, become governor in the event of the resignation or disability of the person elected governor.

Section 4.05. **Election of Governor and Lieutenant Governor.**

The governor shall be elected to serve for a term of four years beginning on the third Wednesday of January following his election. In the event of a tie vote, the governor shall be elected from the candidates having received the tie vote by the affirmative vote in joint session of a majority of the combined membership of both houses as the first order of business after their organization. Each candidate for lieutenant governor shall run jointly in the general election with a candidate for governor and the votes cast for one shall be considered as cast also for the other. The candidate for lieutenant governor whose name appears on the ballot jointly with that of the successful candidate for governor shall be elected lieutenant governor.

Comment:

This draft section provides that the governor is to be popularly elected. It combines in substance Article II, Sections 2, 3 and 4 of the present Constitution. This draft section omits the detailed provisions dealing with qualifications of voters, counting the votes, and the date of the gubernatorial elections.

The most significant change made by this draft section is to prescribe that the governor is to take office on the third Wednesday in January, the same day prescribed by draft Section 3.12 for the members of the General Assembly to take office, unless otherwise prescribed by law. The present Constitution provides that members of the General Assembly shall take office on the third Wednesday in January and that the governor shall take office on the fourth Wednesday in January.

The Commission believes that the present one-week hiatus between the

legislators taking office and the governor taking office is potentially harmful because it affords an opportunity to the "lame-duck" governor to seek "last minute" legislation from a new General Assembly and to appoint persons to offices which require legislative approval. An additional problem arises from the possibility of an incumbent governor being elected to membership in a new General Assembly, in which case he might find it necessary to resign as governor in order to be sworn in as a legislator. For these reasons the Commission recommends that the governor and the members of the legislature take office on the same day.

This follows the suggestions made to the Commission by members of the legislative liaison committee. More recently, Senator William S. James, President of the Senate, has suggested that the governor should take office early in December.[102] Commenting on this suggestion, Governor Spiro T. Agnew said that he thought that a date early in January would be preferable to one early in December.[103]

By a joint resolution passed at its last session, the General Assembly called attention to the awkwardness of the present situation under which a newly elected governor takes office later than the newly elected General Assembly, and recommended that the Constitutional Convention give consideration to a provision under which a newly elected governor would take office thirty days after his election and the newly elected General Assembly would at the same time meet for one day to organize and select its presiding officers.[104]

This draft section also provides for the General Assembly to elect a governor from the candidates who were tied in the popular general election where no candidate has received a plurality. Although the Commission believes the likelihood of a tie to be remote, it recommends that the constitution contain a provision for such a contingency.

This draft section also provides that the governor and lieutenant governor shall run as a team in the general election and that each voter shall cast a single vote for any ticket of candidates for the two offices. This would adopt in the State of Maryland the same practice as is now followed in six other states[105] and the same as is traditionally used, but not constitutionally required, for the election of the President and Vice-President of the United States.

Because of the Commission's recommendation that the lieutenant governor be available as an assistant to the governor, the Commission believes it desirable to assure that the governor and lieutenant governor will be members of the same political party. This provision also increases the likelihood that the lieutenant governor will be a person compatible with the governor.

[102] Letter from William S. James to H. Vernon Eney, Jan. 16, 1967.

[103] Letter from Spiro T. Agnew to H. Vernon Eney, Jan. 18, 1967.

[104] Joint Resolution No. 41, Laws of Md. 1967.

[105] The following states now provide for joint election of the governor and lieutenant governor: New York, Alaska, Connecticut, New Mexico, Michigan, Hawaii.

GUBERNATIONAL SUCCESSION

Section 4.06. **Failure of Governor to Take Office.**

When the governor-elect is disqualified, resigns or dies following his election, but prior to taking office, the lieutenant governor-elect shall succeed to the office of governor for the full term. When the governor-elect fails to assume office for any other reason, the lieutenant governor-elect shall serve as acting governor, but if the governor-elect does not assume office within the first six months of the term, the office shall be vacant.

Comment:

This draft section provides for the order of succession in cases where the governor-elect fails to assume office for any reason. If the governor-elect dies, resigns, or is disqualified, the lieutenant governor-elect succeeds to the office for the full term. When the governor-elect is temporarily unable to take office, the lieutenant governor-elect serves as acting governor from the beginning of the governor's term until the governor is able to assume his office, or until the expiration of six months, whichever occurs first. This draft section also provides that should the governor fail to take office during the first six months of his term, the office becomes vacant.

Section 4.07. **Lieutenant Governor as Acting Governor.**

When the governor notifies the lieutenant governor in writing that he will be temporarily unable to carry out the duties of his office or when the governor is disabled and thereby unable to communicate such inability to the lieutenant governor, the lieutenant governor shall serve as acting governor until the governor notifies the lieutenant governor in writing that he is able to carry out the duties of his office. If the governor does not notify the lieutenant governor in writing that he is able to carry out the duties of his office within six months from the time the lieutenant governor begins serving as acting governor, the office of governor shall be vacant.

Comment:

Although Maryland has apparently never had a governor who, because of disability, was unable to serve the entire term to which he was elected,[106] the experience of other states and of the federal government would suggest that provision should be made for cases where the chief executive may become disabled. The present Constitution provides for the election of a successor to the governor only in the event of the governor's death. There is no provision for instances where the governor may become disabled. The Commission recommends that the constitution contain provisions for the succession to the office of governor in the event of either death or disability.

Provision is made in this draft section for the lieutenant governor to succeed to the powers of the governor, either on a temporary basis as acting governor or, in the case where the office of governor becomes vacant, as governor.

This draft section permits the lieutenant governor to act as governor whenever the governor is temporarily disabled. This may occur at a time when the governor is to undergo surgery,

[106] Three governors, however, have resigned for other reasons: in 1809, Governor Wright, to run unsuccessfully for election as a judge; in 1874, Governor Whyte, upon being elected United States Senator; and in 1885, Governor McLane, to become United States Minister to France.

should he choose voluntarily to turn over his powers to the lieutenant governor by written notice. On the other hand, should the governor be unable to communicate his disability to the lieutenant governor because of the nature of his disability, the lieutenant governor would automatically succeed to the powers of the office of governor. In either situation, the governor can reclaim the powers of his office within six months merely by notifying the lieutenant governor in writing that he again is able to assume those powers. Should the governor not reclaim the powers of his office within six months, his tenure would be terminated and the office would become vacant.

Section 4.08. **Legislative Determination of Disability.**

The General Assembly may, by the affirmative vote in joint session of three-fifths of the combined membership of both houses, pass a resolution stating that the governor is unable to carry out the duties of his office by reason of a physical or mental disability. Upon the written request of a majority of the members of each house the General Assembly shall be convened by the presiding officers of both houses to determine whether such a resolution should be passed. If the General Assembly passes such a resolution, it shall be delivered to the Supreme Court which shall then have exclusive jurisdiction to determine whether the governor is unable to discharge the duties of his office by reason of a disability. If the Supreme Court determines that the governor is unable to discharge the duties of his office by reason of a disability, the office shall be vacant.

Comment:

This draft section sets forth a procedure by which a disabled governor may be officially declared disabled by the successive actions of the General Assembly and the Supreme Court. The General Assembly may adopt a resolution upon the affirmative vote of three-fifths of the combined membership of both houses declaring the governor to be unable to discharge the duties of his office due to physical or mental disability. Should the General Assembly not be in session at the time of the need for such a resolution, the presiding officers of the two houses may convene the General Assembly upon the written notice of a majority of the members of each house.

Upon the adoption of a resolution declaring the governor to be disabled, the question of the governor's disability must be reviewed by the Supreme Court, which is given exclusive jurisdiction to declare the office of governor vacant because of the incumbent's disability. The participation of the Supreme Court in this procedure is considered by the Commission to be very important since it may serve to protect the governor from irresponsible action by a hostile legislature.

This draft section does not attempt to define the term "disability." It is hoped that "disability" will be broadly defined, recognizing any condition which renders the governor unable to discharge the duties of his office. The determination of "disability" should be primarily a question of fact rather than a question of law.

The problem of a government's chief executive becoming disabled has recently been reexamined on the federal level. The Twenty-Fifth Amendment to the United States Constitution, recently ratified by the required thirty-eight states, provides that when the President

voluntarily wishes to vacate his office temporarily, he may send a written declaration of inability to the president of the Senate and the speaker of the House of Representatives. Thereupon, the Vice-President, acting as President, may then discharge the duties of the office of President until the President reclaims his office by sending another written declaration to Congress.

If the President is unable to make or communicate his decision to relinquish the powers of the office of President because of his physical ailment, or if he is unable or unwilling to make such a decision because of his mental debility, the Twenty-Fifth Amendment empowers jointly the Vice-President and a majority of the President's Cabinet or "such other body as Congress may by law provide" to initiate action to authorize the Vice-President to "assume the powers and duties of the office as acting President."

Upon the transmission of the decision to Congress by the Vice-President and a majority of the President's Cabinet that the President has become disabled, the Vice-President will become acting President. The President may again assume the powers of his office upon sending his written declaration to Congress that he is again able to fulfill his responsibilities, unless such declaration is challenged by the Vice-President.

The Congress, if not in session at the time of any challenge by the Vice-President, must assemble within four days. Thereupon, Congress is required to act within twenty-one days. It may choose between the following alternatives: it may act and by the affirmative vote of two-thirds of both houses uphold the Vice-President's challenge; it may act and by a one-third plus one affirmative vote in either house reject the Vice-President's challenge; or it may fail to act within twenty-one days, whereupon the President will automatically be restored to his office.

Section 4.09. **Judicial Determination of Vacancy.**

The Supreme Court shall have exclusive jurisdiction to determine the existence of a vacancy under this Constitution in the offices of governor and lieutenant governor and all questions arising under this Article concerning the right to office or the exercise of the powers thereof.

Comment:

This draft section places exclusive jurisdiction in the Supreme Court to determine all questions arising as to the existence of a vacancy in the offices of governor or lieutenant governor, all questions with respect to the right of persons to hold these offices, and all questions concerning the right to exercise the powers of these offices. It is thought desirable that all questions concerning persons authorized to exercise the power of governor should be resolved expeditiously and that unnecessary litigation in the lower courts and consequent appeals should be avoided.

It should be noted that this draft section does not prescribe the procedures to be followed by the Supreme Court in cases of gubernatorial succession. All required procedures will be determined by the rules of the court.

Section 4.10. **Succession to Office of Governor.**

When a vacancy occurs in the office of governor, the lieutenant governor shall succeed to the office of governor for the unexpired term. If a vacancy exists in the office of lieutenant governor when the lieutenant governor is to succeed to the office of governor or to serve as acting governor, the president of the Senate shall succeed to the office of governor for the unexpired term or serve as acting governor. If a vacancy exists in the office of president of the Senate when the president of the Senate is to succeed to the office of governor or to serve as acting governor, the Senate shall convene and fill the vacancy.

Comment:

This draft section prescribes the line of succession to the office of governor. If the office of governor becomes vacant, the lieutenant governor will succeed to it, unless the office of lieutenant governor is also vacant, whereupon the president of the Senate will succeed to the office of governor. This section avoids the necessity for there ever being a special election to fill the vacancy in the office of governor. The line of succession is open-ended since the Senate always will have a president or the means by which to select one.

Some persons have questioned the advisability of placing a legislative official, elected from a single legislative district, in the line of succession to the office of governor since, unlike the governor and the lieutenant governor, he would lack a statewide constituency. Nevertheless, the Commission recommends this draft section as the best alternative solution available because there is, to some degree, a statewide endorsement of the president of the Senate through the people's elected representatives. In addition, the president of the Senate is likely to have extensive familiarity with the affairs of the State and this should qualify him to assume the powers of the office of governor in the event of his succession.

Some have suggested that members of the "governor's cabinet," who will probably be appointed, should follow the lieutenant governor in the order of succession to the office of governor; however, the Commission feels that it is more consistent with the democratic principles of government to provide that a legislative official will follow the lieutenant governor in the order of succession.

This draft section does not define the term "vacancy" except to the extent that a definition is implied from its use. Clearly, death, the disability of the governor for six months, or the failure of the governor-elect to take office within six months of the beginning of his term will create a vacancy. All other occasions of a vacancy are to be determined by legislative definition and judicial interpretation and decision.

Section 4.11. **Powers and Duties of Successor.**

When the lieutenant governor or the president of the Senate succeeds to the office of governor, he shall have the title, powers, duties and emoluments of the office; but when the lieutenant governor or the president of the Senate serves as acting governor, he shall have only the powers and duties of the office. When the president of the Senate serves as acting governor, he shall continue to be president of the Senate; but during his service as acting governor, his duties as president shall be performed by such person as the Senate shall select.

Comment:

This draft section clarifies the difference between service by the lieutenant governor or president of the Senate as acting governor and the succession by either to the office of governor. The last sentence of this draft section fills a possible gap in the succession provisions by insuring that a president of the Senate who is serving as acting governor due to the incumbent's disability will not be removed from the line of succession to the office of governor in the case where, upon the failure of the incumbent to resume his office within six months, the president of the Senate would become governor.

LEGISLATIVE RESPONSIBILITIES OF GOVERNOR

Section 4.12. **Messages to General Assembly.**

The governor shall inform the General Assembly of the condition of the State and may recommend measures he considers necessary or desirable.

Comment:

This draft section recognizes the governor's responsibility for annually reporting to the people of the State, through their elected representatives, on the condition of the State. It also recognizes the governor's leadership in designing and promoting a legislative program. The Commission considers the governor's direct involvement in the legislative process desirable both because of his statewide constituency which affords him a perspective of the entire scope of the State's problems and because, as the State's chief executive, he has sources of information not readily available to the General Assembly which may make him aware of the need for revision of existing laws. This draft section is very similar to Article II, Section 19 of the present Constitution.

Section 4.13. **Convening General Assembly.**

The governor may, on extraordinary occasions, convene the General Assembly or the Senate alone by proclamation, stating the purpose for which he has convened it.

Comment:

This draft section, similar to Article II, Section 16 of the present Constitution, empowers the governor, on extraordinary occasions, to convene the General Assembly or the Senate alone upon his own initiative. This provision is necessary because the General Assembly sits in sessions of limited duration and, with increasing frequency, situations arise between sessions of the General Assembly which require its immediate attention and action.

Provision is made for the governor convening the Senate into special session alone because of the possibility that the General Assembly may provide by law that, in the case of certain specified offices, the governor shall be authorized to appoint persons to those offices upon the confirmation of the Senate.

Although this draft section requires that the governor issue a proclamation stating the purpose for which he has convened the General Assembly into special session, the General Assembly is not restricted to the consideration of those matters contained in the proclamation. The Commission believes that on occasion an extraordinary session may be used efficiently to debate and act upon other matters of urgency before the State.

Section 4.14. **Veto by Governor.**

All bills passed by the General Assembly shall be subject to veto by the governor, except budget bills and bills proposing amendments to the Constitution.

Comment:

This draft section states the scope of the governor's veto power. Budget bills are excepted from the governor's veto because they originate with the governor, and the General Assembly is restricted in its power to modify them. The term "budget bill" is defined in draft Section 6.06 and refers to "a bill for all the proposed appropriations of the budget."

Bills proposing amendments to the constitution also are excepted from the governor's veto power because, pursuant to draft Section 9.01, they can be passed only upon the affirmative vote of three-fifths of all the members of each house of the General Assembly. This extraordinary vote is the same as that prescribed by both draft Section 4.17 and Article II, section 17 of the present Constitution to permit the General Assembly to override a governor's veto.

Section 4.15. **Item Veto.**

The governor may strike out or reduce any item in a supplementary appropriation bill and the procedure in such a case shall be the same as in the case of the veto of a bill by the governor.

Comment:

This draft section empowers the governor to veto or reduce any item in any appropriation bill except the budget bill. The term "supplementary appropriation bill" is defined in draft Section 6.10. This power complements the governor's power to veto all bills passed by the General Assembly since, unlike the budget bill, supplementary appropriation bills do not originate with the governor. The item veto permits the governor to reject certain proposed expenditures without vetoing all expenditures contemplated in a single supplementary appropriation bill.

Section 4.16. **Presentation of Bills to Governor.**

A bill subject to veto by the governor shall be presented to him within seven days after its final passage by the General Assembly. If the General Assembly is in session, the bill shall become law if the governor signs or fails to veto it within ten days of presentation. If the General Assembly adjourns sine die *before presentation or during such ten-day period, the bill shall become law if the governor signs or fails to veto it within forty-five days of presentation.*

Comment:

This draft section reverses the effect of Article II, Section 17 of the present Constitution that no bill becomes law unless signed by the governor except in the case where the governor fails either to sign a bill or to return the unsigned bill to the General Assembly within six days of its presentation to him if the General Assembly is still in session. Under this draft section a bill will become law either when signed by the governor or, upon his failure to sign, when a specified period of time elapses, whether or not the General Assembly is in session. Thus, this provision eliminates any possibility of a "pocket veto."

This draft section requires that bills subject to the governor's veto be presented to him for his signature or veto within seven days following their enactment. The governor will, therefore, no longer have the discretionary power to determine the time of presentation of bills. While the General Assembly is in session, the governor will have ten days from the date of presentation within which to sign or veto a bill. Should the governor fail either to sign or to veto a bill within the ten-day period, the bill will become law.

In the event that the General Assembly should adjourn prior to the presentation of any bill or during the ten-day period following the presentation of any bill, the governor is allowed forty-five days from the date of presentation within which to sign or veto a bill. Should the governor fail either to sign or to veto a bill within this forty-five day period, the bill will become law.

The Commission believes that this draft section allows the governor adequate time in which to consider all bills and that the provisions of this section will eliminate the difficulties which have arisen under the following provision of Article II, Section 17 of the present Constitution:

> "If any bill shall not be returned by the Governor within six days (Sundays excepted) after it shall be presented to him, the same shall be law in like manner as if he signed it, unless the General Assembly shall, by adjournment, prevent its return, in which case it shall not be law."

A literal reading of this language would indicate that the Constitutional Convention of 1867 apparently intended that, in order for a bill to become law, it had to be presented to the governor and, while the General Assembly was still in session, had to be either signed or left unsigned for six days. It was thought that this provision would compel the General Assembly to enact laws throughout its sessions rather than enacting the most important legislation before or at the very end of the session.[107]

Prior to 1880 governors did not attempt to sign bills into law after the General Assembly had adjourned. In 1880 several bills were presented to and signed by the Governor after the adjournment of the General Assembly. Thereafter, this became a general practice. The validity of this action was first judicially tested in 1890 and was upheld in a split decision of the Court of Appeals.[108]

Since 1890 the practice of governors of signing bills into law after the adjournment of the General Assembly has consistently been held to be valid.

This practice, nevertheless, raised an important question which has remained unresolved. Since Article II, Section 17 was not designed to permit a governor to sign a bill into law following the adjournment of the General Assembly, no time limit is set forth in that provision within which the governor must act. Most bills become law on the first day of June, under Article III, Section 31 and Article XVI, Section 2 of the present Constitution, and the governor has made it a practice in recent years to sign bills passed at a regular session of the General Assembly into law no

[107] PERLMAN, DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867, 188 (1923).

[108] Lankford v. Somerset Co., 73 Md. 105 (1890).

later than May 7. Nevertheless, it appears that the governor might be able to sign a bill into law at a date later than May 7. The Court of Appeals specifically left this question unanswered in *Richards Furniture Corp. v. Board.*[109]

Ostensibly, Article II, Section 17 of the present Constitution narrowly restricts the governor's ability to prevent a bill from becoming law by declining to sign it since, if he does not sign it within six days from the time of its presentation to him, it becomes law without his signature unless the General Assembly has adjourned in the interim. Again, it should be remembered that it was never contemplated that under this provision a governor could sign bills into law after the adjournment of the General Assembly and the original practice was that all bills enacted by the General Assembly were presented to the governor before the last six days of each session. In actual practice, however, the governor can effectively prevent most bills from becoming law through calculated inaction and, more importantly, can foreclose or at least postpone the possibility that the General Assembly will override his veto.

The governor's present "pocket veto" is partially a result of the judicial definition of "presentation." Article 41, Section 45 of the Maryland Code provides that:

> "[E]very bill, when passed by the General Assembly . . . shall, as soon thereafter as *practicable* . . . be . . . presented to the Governor for his approval." (Emphasis added.)

This section has been implemented by Rule 59 of the rules of both the House and the Senate, which provides that every bill is to be presented to the governor within seven days after final passage unless passed during the last ten days of a regular session, in which case it need not be presented until May 1.

Since the six-day period in the present Constitution begins to run at the time of presentation, it would seem that the statute and its supporting rule would prevent a "pocket veto" of any bill passed during the first fifty-seven days of a seventy-day session. However, the Court of Appeals has decided that "presentation" does not occur upon the mere delivery of a bill to the governor and that the governor need not permit a bill to be presented until it is *practicable* for him to consider it.[110]

The more or less unchecked power of the governor to control the time of the "presentation" of a bill has given rise to an administrative practice under which a bill received by the governor's office is immediately referred to the attorney general until the governor decides what action he wishes to take. "Presentation" is then considered to occur on the same day that the governor either signs or vetoes the bill or a few days before then.

The important consequence of the governor's power to determine when a bill is presented is that it permits him to postpone the "presentation" of a bill passed early in a legislative session until after the General Assembly has adjourned, thus preventing the General Assembly from overriding his potential veto and permitting the governor to kill legislation by refusing to act altogether.

[109] 233 Md. 249, 261 (1963).

[110] Richards Furniture Corp. v. Board, 233 Md. 249, 261-62 (1963); Robey v. Broersma, 181 Md. 325, 341 (1943), *modifying on rehearing* 181 Md. 325 (1942).

The Commission believes that the governor, after being given a reasonable opportunity to consider actions of the General Assembly, should be required either to sign bills into law or to veto and return them to the General Assembly during the same session in which they were enacted. To accomplish this purpose the Commission recommends this draft section.

Section 4.17. **Return of Vetoed Bills.**

When the governor vetoes a bill, he shall return it to the General Assembly within ten days of presentation if the General Assembly is in session. A bill that is returned by the governor may be reconsidered by the General Assembly; and if, upon reconsideration, the bill is passed by the affirmative vote of three-fifths of all the members of each house, it shall become law.

Comment:

This draft section provides that the General Assembly will have an opportunity to override the governor's veto of any bill which is passed during the first fifty-three days of a legislative session, at that same legislative session. Under this draft section the governor is required to return each vetoed bill to the General Assembly for its reconsideration within ten days of its presentation to him if the General Assembly is still in session. The result will be that, during the first fifty-three days of each legislative session, all bills enacted either will be signed into law by the governor, will become law because of the governor's failure to either sign or veto the bill, or will be returned to the General Assembly upon the governor's veto.

This draft section omits any provision similar to that in the second paragraph of Article II, Section 17 of the present Constitution, which requires that any bill which is vetoed by the governor after the adjournment of the General Assembly be returned to the General Assembly at its next regular session for possible passage over the governor's veto. The Commission feels that such a provision is unnecessary as the governor will no longer have the power to postpone the presentation of bills to him for his signature. Under the procedure set forth in this draft article the General Assembly will be able to protect its interest in overriding potential gubernatorial vetoes by passing bills during the first fifty-three days of each session.

The provision of this draft section that upon the affirmative vote of three-fifths of all the members of each house the General Assembly may override a gubernatorial veto is the same as that in Article II, Section 17 of the present Constitution.

ADMINISTRATIVE ORGANIZATION

Section 4.18. **Organization of Principal Departments.**

All offices, agencies and instrumentalities of the legislative and executive branches of the state government exercising executive and administrative functions, powers or duties shall be allocated by law among and within principal departments. Regulatory and quasi-judicial agencies shall be assigned by law to either the legislative or executive branch and may, but need not, be established within a principal department. The head of each principal department shall be either a single executive or a board or commission. When a board or commission is at the head of a principal department, a chief administrative officer may be provided for it by law.

Comment:

Experts in the field of public administration have long advocated the following "principles" of administrative organization:

1. Concentration of authority and responsibility in the governor.
2. Functional integration of state agencies.
3. Undesirability of boards for purely administrative work.[111]

The present structure of the executive branch in Maryland fails to comply with these "principles." As former Governor Tawes indicated in a message to the General Assembly on March 22, 1966, there are 148 separate units within the administrative structure of the State; these separate administrative offices are concerned with many of the same problems; and many of the agencies and boards are unaffiliated within the administrative structure with the result that they are beyond the effective direction or supervision of the governor.[112]

The Commission considered for inclusion in a new constitution several provisions designed to remedy the deficiencies in Maryland's administrative structure. First, consideration was given to a provision which would set or limit the number of principal administrative departments which could exist at any one time. The National Municipal League suggests in its *Model State Constitution*[113] that the number be limited, and the constitutions of Alaska, Hawaii, Massachusetts, New Jersey and New York each establish the maximum number at twenty.

The Commission rejected the proposal either that there be a designated number or that a maximum limitation be set. Although the Commission recognizes the need for functional integration of the State's administrative activities into as few units as practicable, it does not believe that a constitutional limitation on the number of administrative departments would accomplish this objective. If the maximum number of administrative units is presently limited to a reasonable number, the limitation may prove too restrictive in the future; and if the maximum number of administrative units is set at a figure which is sufficiently high for future expansion, no purpose is served. The Commission recommends, therefore, that the number of principal departments be established by law.

Nevertheless, the Commission does recommend in this draft section that all offices, agencies and instrumentalities of both the legislative and executive branches of the state government which exercise executive or administrative functions, powers or duties be allocated by law to a principal department. Recognizing that the assignment of regulatory and quasi-judicial agencies to principal departments may raise jurisdictional conflicts, the Commission recommends that these agencies at least be assigned to either the legislative or executive branch by law.

The Commission also considered and rejected for inclusion in a new constitution a provision which would prohibit the establishment of policy-making boards to head principal departments. Although the Commission believes that

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[111] HEADY, STATE CONSTITUTIONS: THE STRUCTURE OF ADMINISTRATION 3 (National Municipal League 1961).

[112] 2 MESSAGES, ADDRESSES AND PAPERS OF J. MILLARD TAWES, GOVERNOR OF MARYLAND 53 (1967).

[113] NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 71 (6th ed. 1963) (hereafter cited as MODEL STATE CONSTITUTION).

it will usually be preferable for departments to be organized under a single administrative head, it does not believe that having a policy-making board serve as the head of a principal department is always undesirable. The Commission recommends that the question of establishing policy-making boards at the head of principal departments should be determined by law, but that where such a board is the head of a principal department, a chief administrative officer also should be provided for by law.

This draft section, while not specifically structuring the administrative organization of the State, removes from the present Constitution the obstacles to reorganization. This draft section creates no administrative departments.

Section 4.19. **Reorganization of Principal Departments.**

The functions, powers and duties of the principal departments and of the agencies of the State within the legislative and executive branches shall be prescribed by law. The governor may reallocate the functions, powers and duties of the principal departments and of the agencies within the executive branch for efficient administration. Proposed changes in the allocations prescribed by law shall be set forth in executive orders which shall be submitted to the General Assembly within the first ten days of a regular session. A proposed change which is approved, or which is not specifically disapproved or modified by the General Assembly within fifty days after submission, shall become effective on a date designated by the governor and thereafter have the force of law.

Comment:

This draft section places upon the General Assembly the responsibility to prescribe by law the functions, powers and duties of each principal department and agency within either the executive or legislative branches. However, in the case of the executive branch this draft section also empowers the governor to take the initiative in implementing any recommendation for executive reorganization which he desires to make, those which have been made by the Commission for the Modernization of the Executive Branch of the Maryland Government,[114] and any others which may be thought desirable in the future.

When such reorganization requires changes in the allocations of functions, powers and duties which are prescribed by law, the governor must issue an executive order which sets out the proposed changes and must submit his order to the General Assembly within ten days of its next regular session. The General Assembly will then have fifty days within which either to approve, reject, or modify the governor's order. After this time the order will become effective on a date designated by the governor if not previously modified or disapproved by the General Assembly, or the order could become effective earlier if approved by the General Assembly.

Governor Tawes suggested in a message to the General Assembly on March 22, 1966, that the governor be empowered to reorganize the executive branch.[115] The Commission on the Mod-

[114] Report of the Commission for the Modernization of the Executive Branch of the Maryland Government (1967) (hereafter cited as Curlett Commission Report).

[115] 2 Messages, Addresses and Papers of J. Millard Tawes, Governor of Maryland 53 (1967).

ernization of the Executive Branch of the Maryland Government recommended in its report of January 10, 1967, that the governor be empowered to take the initiative in implementing executive reorganization. That Commission also recommended that gubernatorial proposals for reorganization be submitted to the General Assembly for its consideration and action within a specified period of time; however, that Commission thought that the legislative action on those gubernatorial proposals which were submitted should be limited to approval or rejection and should not include amendment or other modification.[116]

A similar provision for reorganization is suggested by the National Municipal League in its *Model State Constitution*[117] and another is incorporated in the Alaska Constitution.[118] A similar approach to executive reorganization has been followed in the national government and in the states of Michigan, Pennsylvania, and South Carolina as a result of authorizing legislation.[119]

Section 4.20. **Appointment and Removal of Administrative Officers.**

The governor shall appoint each executive serving as the head of a principal department and each chief administrative officer serving under a board or commission which is the head of a principal department, except the head or chief administrative officer of an institution of higher education, of the state public school system, or of a principal department within the legislative or judicial branches. Each gubernatorial appointee shall have the professional qualifications which may be prescribed by law and shall serve at the pleasure of the governor.

Comment:

The Commission recommends this draft section because it believes that the executive power of the State, with all its authority and responsibility, must be concentrated in the governor if there is to be efficient administration and if policy is to be controlled by the electorate. If the executive branch is to have direction, the governor must be able to influence those officials within the executive branch who are responsible to him for executing the administration's programs and policies. The Commission, therefore, recommends that the governor be empowered to appoint and remove at pleasure each executive or administrative head of a principal department within the executive branch.

There is significant support for this recommendation. The Commission on Administrative Organization of the State recommended that all executive and administrative agencies be made directly responsible to the governor.[120] The National Municipal League suggests in its *Model State Constitution* that the governor be given plenary power to appoint and remove department heads within the executive branch.[121] Former Governors Lane, McKeldin and Tawes each testified before the Commission that he favored the governor being given such appointive and removal power.[122]

[116] CURLETT COMMISSION REPORT 9.

[117] MODEL STATE CONSTITUTION 72.

[118] ALASKA CONSTITUTION article III, section 23.

[119] CURLETT COMMISSION REPORT 11-15.

[120] TWELFTH REPORT OF THE [MARYLAND] COMMISSION ON ADMINISTRATIVE ORGANIZATION OF THE STATE 29 (1953).

[121] MODEL STATE CONSTITUTION 72.

[122] Testimony by Governor Lane 7-11. Testimony by Governor McKeldin 7-12. Testimony by Governor Tawes 27-31.

This draft section excepts from its operation the head or chief administrative officer of an institution of higher education or of the state public school system. The Commission believes that public education occupies a unique position among the services rendered by the State. To assure academic freedom in public education and to insulate it from any risk of political influence, the Commission recommends that the constitution not require that the heads of the public educational institutions be subject to appointment and removal by the governor but rather that the appointment and removal of these officials be as prescribed by law.

The Commission considered the danger of the governor using his broad power of removal for partisan purposes and concluded that to some degree a governor is entitled, under the party system, to appoint persons of his own party as chief lieutenants, but that there are also sufficient safeguards against an abuse of his power. First, there is the Maryland tradition against the wholesale removal of principal public officials when there is a change in the office of the governor. Second, this draft section authorizes the General Assembly to establish professional qualifications for the heads or chief administrative officers of principal departments who are subject to appointment and removal by the governor. Should the governor desire to make a change, he must appoint a person who meets the qualifications prescribed by law.

It should be observed that this draft section applies only to the head or chief administrative officer of a "principal department." The appointment and removal of the heads or chief administrative officers of sub-departments would be as prescribed by law.[123]

Section 4.21. **Appointment and Removal of Administrative Boards and Commissions.**

The members of each board or commission which serves as the head of a principal department, except the governing board of an institution of higher education, shall be appointed by the governor and their terms of office shall be prescribed by law in such manner that the governor, upon taking office following his election, shall be able forthwith to appoint at least one-half of them. Such members may be removed as prescribed by law.

Comment:

This draft section empowers the governor to appoint all members of any board or commission which heads a principal department of the executive branch, but not of any board or commission which heads a principal department within the legislative or judicial branches. It should be noted, however, that this power does not extend to appointments to boards which are only advisory.

The Commission recognizes that there are persuasive reasons for insulating some boards or commissions which are the heads of principal departments from an unrestricted power of appointment and removal by the governor. Accordingly, this draft section empowers the governor to appoint some of the members of such boards, but leaves the grounds for their removal to be prescribed by law. Presumably, where a board or commission serves a function which justifies giving it more independence, the General Assembly by law

[123] See draft Section 4.21.

could permit the removal of a member only upon the showing of just cause. On the other hand, it is not contemplated that the General Assembly would categorically deny to the governor the power of removal in the case of every board or commission which heads a principal department.

This draft section assigns to the General Assembly the power to prescribe the terms of office of the members of boards and commissions which head principal departments with the restriction that at least one-half of the membership of each board or commission must be subject to appointment by the governor upon his taking office. This assures that the governor will have the opportunity to appoint enough members to each of these boards upon taking office so as to make them responsive to him and his administrative program and thus, indirectly, responsive to the electorate.

At the same time, the General Assembly has considerable latitude in prescribing staggered terms. The governing boards of state colleges and universities are exempted from the application of this draft section.

Section 4.22. **Appointments and Removals Prescribed by Law.**

The members of the governing board of an institution of higher education, the head or chief administrative officer of an institution of higher education, of the state public school system, or of a principal department within the legislative or judicial branches, and the members of a regulatory or quasi-judicial agency which does not serve as the head of a principal department, shall be appointed and may be removed as prescribed by law.

Comment:

This draft section is the concluding and complementing section for the preceding four. It assigns to the General Assembly the responsibility for prescribing by law the procedure for appointing and removing the members of the governing board of any institution of higher education; the members of any regulatory or quasi-judicial agency which does not serve as the head of a principal department within the executive branch; and the head or chief administrative officer of an institution of higher education, of the state public school system, or of a principal department within either the legislative or judicial branches.

It should be noted that neither this draft section nor the preceding four make mention of the State's merit system. The Commission believes that the merit system for governmental employees below the level of primary policy-makers has become so ingrained in the State's administrative system that specific mention of it in the constitution is unnecessary. Its mention is also undesirable since inclusion would require considerable detail if such a provision is to have any value and this detail could hamper any necessary or desirable revision of the system in the future, thus reducing the flexibility of Maryland's state government under a new constitution.

Section 4.23. **Information from Administrative Officers.**

The governor may at any time require information, in writing or otherwise, from any officer of any executive or administrative department, office, or agency upon any subject relating to that department, office, or agency.

Comment:

This draft section empowers the governor to require information from any officer of any executive or administrative department, office, or agency, to enable the governor to administer the State's affairs with knowledge and to satisfy himself, pursuant to the responsibility placed upon him in draft Section 4.01, that the laws of the State are being faithfully executed. It should be noted that the coverage of this draft section includes any executive or administrative department, office or agency within either the executive, the legislative or the judicial branch. This would not permit the governor to request advisory opinions from any of the State's courts and would not permit the governor to force the disclosure of information by officers of the General Assembly or any of its committees which they otherwise do not desire to disclose; however, it would permit the governor to require information from the administrator of the various courts, the Bureau of Fiscal Research, the Department of Legislative Reference, and other such similar administrative officials and departments within either the legislative or the judicial branch.

This draft section would supersede the provisions of Article II, Section 18 of the present Constitution which requires that the governor semi-annually examine the treasurer and comptroller under oath and inspect their accounts. The present comptroller testified before the Commission that there is no longer compliance with this requirement of the present Constitution.[124]

CLEMENCY

Section 4.24. Executive Clemency.

The governor shall have power to grant reprieves and pardons, except in cases of conviction upon impeachment, and to remit fines and forfeitures for offenses against the State. He shall report to the General Assembly in writing, at least annually, of the instances of the exercise of this power.

Comment:

This draft section is essentially the same as Article II, Section 20 of the present Constitution; however, several changes have been made. First, the language of the present Constitution infers that the governor has the power to grant a *nolle prosequi*. Only one instance of the exercise of this power has been found.[125] This draft section does not empower the governor to grant a *nolle prosequi*. The Commission believes that the governor should not be authorized to intervene in criminal proceedings until the criminal prosecution has ended.

Former Governors Lane, McKeldin and Tawes testified before the Commission that they did not believe that a governor should have the power to grant a *nolle prosequi* and that they had not realized that the power existed in the governor under the present Constitution.

The requirement of newspaper publication of the governor's actions with respect to the granting of *nolle prosequi* and pardons is deleted because the Commission believes that the requirement that the governor report to the General Assembly on the exercise of his power to grant reprieves and pardons will afford sufficient publicity.

[124] Testimony by Comptroller Goldstein 71.

[125] Maryland v. Morgan, 33 Md. 44 (1870).

The Commission considered whether the governor should be authorized to delegate his power of clemency and concluded that such an authorization would not be desirable. The Commission believes that the governor alone should bear the responsibility for making the final decision as to the exercise of his power of clemency, although he will undoubtedly continue to receive expert advice in such matters.

ARTICLE V. JUDICIAL BRANCH

Introductory Comment:

The judicial process in Maryland, built upon the common law tradition, has its roots deep both in early Maryland history and in English history. Since the judicial practices of the State and many features of its judicial organization are outgrowths of historical precedent and constitutional provisions, a knowledge of the development of the State's judicial system would be helpful to an understanding of the present judicial structure. However, a complete review of the growth of the judicial branch, although desirable, would require more space than is here available. Accordingly, reference must be made to other sources for more detailed information.[126]

In the early years of proprietary government in Maryland, the governor, as the direct representative of the Lord Proprietary, performed all the judicial functions personally. This burden very quickly became too great and, as a result, county courts were established. The County Court of St. Mary's became the chief court in the Province and was known as the Provincial Court. As the need arose, counties, which were in essence judicial districts, were created from time to time and the number of county courts increased. A Chancery Court and an Admiralty Court also came into existence.

This sytem was in part continued and in part changed by the Constitution of 1776. That Constitution explicitly prohibited judges from holding any other governmental position, provided that they were to be appointed by the governor with advice and consent of a newly created five-member Advisory Council and that they could be removed only for misbehavior or by the legislature upon request of the governor. The Constitution of 1776 also established the Court of Appeals as a court separate from the trial courts. The Provincial Court was replaced by the General Court, composed of three judges, and having both original jurisdiction and some appellate jurisdiction. It was Maryland's single experiment with an intermediate court of appeals until 1966.[127]

Although county courts were recognized by the 1776 Constitution, the details of their organization were left to the General Assembly. In 1790, the General Assembly provided that the county courts would be composed of a chief judge and two associate judges who would hold their offices during good behavior. Only the chief judges were required to be trained in the law.

The Constitution of 1776 also provided that justices of the peace were to be appointed by the governor with the approval of the Advisory Council; and they could hear petty cases. Here it should be noted that under its new constitutional authority, the General Assembly abolished the old probate arrangement, consisting of the commissary-general and his county deputies, and assigned all probate duties to orphans' courts for each county. These

[126] Bond, The Court of Appeals of Maryland, A History (1928); Byrd, The Judicial Process in Maryland (Univ. of Md. Bureau of Governmental Research 1961); Hall, Baltimore: Its History and its People (1912).

[127] Acts of 1966, chapter 10, ratified Nov. 8, 1966.

courts have survived until the present time with a few organizational changes.

The Constitution of 1776 was amended in 1805 to divide the State into six judicial districts, two of which were situated on the Eastern Shore and four on the Western Shore. It was provided that each district should have three judges, each of whom was required to be a continuing resident of the district for which he was appointed. One of the three judges in each district was designated as chief judge, and the three judges together composed the several county courts for the counties situated in the particular district. Judges held their commissions during good behavior.

The 1805 amendment also provided that the six chief judges of the districts should collectively constitute the Court of Appeals. With the abolition of the General Court, the appellate jurisdiction which it formerly held was added to that of the Court of Appeals.

By 1851, much opposition had arisen to what was in effect life tenure for judges and to their selection by appointment. Tenure was limited in most states prior to such action in Maryland.[128]

The Constitution of 1851 abolished the appointive method of selecting judges and, for the first time, provided for the election of law judges. The state judges were elected for ten-year terms while inferior judges, such as those for the orphans' courts, were elected for shorter terms. The Court of Appeals was assigned only appellate duties. Four districts were created solely for the purpose of geographical representation on this Court and a judge was to be elected from each district. The chief judge was designated by the governor with the advice and consent of the Senate.[129]

The 1851 Constitution replaced the old 1805 district courts of general original jurisdiction with circuit courts, divided the State into eight judicial circuits for which one judge was to be elected for each circuit, except the fifth (Baltimore City) which was authorized to have additional judges. The judges of each circuit were directed to sit in each county of the circuit as the circuit court for the particular county. This has given Maryland its unusual, and to non-Marylanders, confusing system of county courts which are legally divisions of the circuit courts.

A new judicial organization was created for Baltimore City when it was separated from Baltimore County by the Constitution of 1851. The new structure included the Court of Common Pleas, the Superior Court, and the Criminal Court. The Orphans' Court and justices of the peace were also continued. The General Assembly was authorized to create an additional court for Baltimore City, which it did in 1853 by establishing the Circuit Court of Baltimore City with jurisdiction in equity cases.

The Constitution of 1851 also provided that each county and Baltimore City was to elect three judges of the Orphans' Court to serve four-year terms. These judges were not required to be lawyers, just as they are not required to be lawyers today.

The 1864 Constitution increased the term of office of appellate and general

[128] Byrd, The Judicial Process in Maryland 10 (Univ. of Md. Bureau of Governmental Research 1961).

[129] In 1944 the similar provision of the 1867 Constitution was amended to provide that the governor alone should designate the chief judge of the Court of Appeals. Acts of 1943, chapter 772, ratified Nov. 7, 1944.

jurisdiction judges from ten to fifteen years. The Court of Appeals was reorganized to consist of five judges elected from five judicial districts by the voters of the entire State. The eight judicial circuits were reorganized into thirteen circuits. Justices of the peace were no longer to be elected, but were to be appointed by the governor with the approval of the Senate.

The 1867 Constitution again made changes in the State's judicial system. Because of a feeling that the Court of Appeals had become too technical, that Constitution specified that the Court of Appeals should consist of eight judges, seven of whom should be the chief judges of the first seven of the judicial circuits and should thereby also serve as circuit judges. It was provided that the eighth member of the Court of Appeals should be a judge elected from Baltimore City who should not have any other duties.

The 1867 Constitution designated Baltimore City as the eighth judicial circuit and created in the City five courts in addition to another "court," called the Supreme Bench of Baltimore City, which was given special jurisdiction in certain matters. In 1888 the General Assembly created a second equity court for Baltimore City, called the Circuit Court No. 2, having concurrent jurisdiction with the Circuit Court.

The 1867 Constitution continued the tenure of judges of the Court of Appeals and the circuit and Baltimore City trial judges at fifteen years; however, it proscribed judges from serving after reaching the age of seventy except with the consent of the General Assembly. This authorization to the General Assembly to continue a judge in office after age seventy was later removed. The Constitution also made judges removable by the governor upon conviction in a court of law or upon address of the General Assembly.

The Constitution of 1867 conferred upon the governor the power to appoint a judge to fill a vacancy. The appointee was to serve until the next general election when his successor was to be elected. In 1881 an amendment was adopted providing for an election of judges every fifteen years beginning in 1882, but vacancies were to be filled by appointment by the governor as before. The fewer elections amendment of 1922 eliminated the special elections for judges every fifteen years and in 1944 another amendment provided that judges appointed by the governor to fill vacancies should hold office until the first biennial general election for Representatives in Congress after the expiration of the term of fifteen years (if the vacancy occurred in that way), or the first such general election after one year after the occurrence of the vacancy in any other way than through the expiration of such term. In consequence of these last two amendments, practically every judge is first appointed to the bench by the governor and in only a relatively few instances in recent years has a judge first ascended the bench as a result of being elected to that office.

SIMPLIFICATION OF COURT STRUCTURE

In July, 1938, the American Bar Association adopted a recommendation which goes to the core of efficient judicial administration:

> "[P]rovision should be made in each state for a unified judicial system with power and responsibility in one of the judges to assign judges to judicial service so as to relieve congestion

of dockets and utilize the available judges to best advantage."[130]

The simplification of court structure will provide a basic framework within which the overall administration of justice can most effectively function. This framework should include an appellate court of final resort, an intermediate court of appeals, a trial court of broad and general jurisdiction and a trial court of limited jurisdiction.

There is, of course, no single or uniform pattern of court integration and simplification. Proposals in some states go beyond those endorsed by the American Bar Association in its Model Judicial Article for State Constitutions.[131] In some states the trial courts, both general and subordinate, are being integrated into a single entity containing various levels or categories of judgeships and an internal distribution of functions accordingly.[132] Examples of this approach are the circuit courts of unlimited trial jurisdiction in Illinois[133] and the circuit court of unlimited trial jurisdiction recommended by the Judicial Study Commission in Indiana.[134] However, the prevailing trend appears to favor a two-level system of trial courts as exemplified in Connecticut, Wisconsin, Alaska, Hawaii and North Carolina.[135]

In recommending a unification and simplification of the judicial system for Maryland, the Commission has sought to maintain the independence of the judge, while at the same time providing an efficient system for dispensing justice. While the Commission realizes that an efficient judicial system requires the implementation of a modern system of "management," it also believes that the power of court management should be vested primarily in the judiciary in order to ensure the retention of these standards.

The Commission has also sought to utilize the advantages of unification, integration and specialization. Experience in other states indicates that these three objectives can be achieved and will work admirably together since they are not mutually exclusive. The Commission, therefore, recommends a system that functions as one unit, utilizes unified trial courts and provides ample opportunity for specialization. The proposed system, while clearly defined, is extremely flexible so that the basic structure in organization can expand to meet changing needs.

This draft article on the Judicial Branch is divided basically into three parts: the structure of the court system; the selection, tenure, and removal of judges; and the administration of the courts.

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[130] 63 American Bar Association Reports 523 (1938).

[131] American Bar Association Section of Judicial Administration, The Improvement of the Administration of Justice 119 (4th ed. 1961).

[132] American Bar Association Section of Judicial Administration, The Improvement of the Administration of Justice 7 (4th ed. 1961); Karlen, Judicial Modernization: What Other States Have Done 111 (The Institute of Judicial Administration 1964).

[133] Annual Report of the Circuit Court of Cook County, Illinois (1964).

[134] Report of the Indiana Judicial Study Commission (1966).

[135] For a detailed discussion of extensive revision of a state's judicial system see The Judicial Department Act of 1965 (a series of explanatory articles from *Popular Government* reprinted by the North Carolina Courts Commission, 1966).

STRUCTURE OF THE COURT SYSTEM

This draft article recommends a unified judicial system consisting of four courts: the Supreme Court, the Appellate Court, the Superior Court, and the District Court. The types of cases which each court would hear and the extent of review which the initial decision in any given case would have would be determined by law. This concept would, the Commission believes, establish a judicial branch in the true sense of the word.

By eliminating the old concept of separate, autonomous courts, the administration of justice can be greatly improved while at the same time, the judges' traditional intellectual and judicial independence is preserved. The Commission believes that by closely linking the judges of both appellate and both trial courts into one working unit, many of the problems of the State's present judicial system can be eliminated.

The Court of Appeals, which the Commission recommends be renamed the Supreme Court, is firmly established as the final and highest appellate court in the State. The Commission recommends that the number of justices be prescribed in the Constitution and that the Supreme Court be given the rule-making power for the judicial system but that its jurisdiction be that prescribed by the General Assembly by law.

The Commission recommends the continuation of the Court of Special Appeals under the name the Appellate Court as the intermediate court of appeals. This court would have the jurisdiction prescribed by law and would be composed of no fewer than five judges; however, the number of judges would be left flexible so that changes can be made to meet the needs of the future. Provision has been made to allow this court to sit in panels of no fewer than three judges.

The Commission recommends that there be a statewide trial court of general original jurisdiction which is uniform throughout the State. It would be called the Superior Court and would have such number of judges as are necessary to conduct the business of the court, but the Constitution would assure that there would be at least one Superior Court judge resident in each county.

The Commission recommends that there also be a statewide trial court of limited original jurisdiction which is uniform throughout the State. The State would be divided into districts composed of one or more entire and continuous counties and this court would be called the District Court. Again, the number of judges is left flexible above the requirement that there be at least one district court judge resident in each district.

SELECTION OF JUDGES

At the close of its 1966 session, the General Assembly had pending before it proposals by the Maryland State Bar Association and the Maryland Judicial Selection Council for amending the State Constitution with regard to the method of selecting judges.[136] These proposals were embodied in a bill which was passed by the House of Delegates but was not passed by the Senate. Instead, the bill was returned by the Senate to its Committee on Judicial Proceedings so that the bill could be referred to the Constitutional Convention Commission for its study and consideration. The Commission's recommendations with respect to the proposals embodied in this bill will be discussed in

[136] House Bill 418 (1966).

detail under the draft sections on judicial selection, removal and tenure.

In an otherwise general draft article, a detailed procedure for the selection of judges is set forth. The governor is restricted in making judicial appointments to a limited number of nominees who will be nominated by a nonpartisan commission. This procedure, coupled with periodic non-competitive elections for continuation in office and power in the highest court to remove members of the judiciary for misconduct, is designed to obtain the best qualified persons for judicial service, to have them independent and impartial during their service, and to permit expeditious removal from office if and when necessary.

ADMINISTRATION OF THE JUDICIAL SYSTEM

The Commission debated at length whether the power to provide for the administration of the judicial system should be vested solely and exclusively in the judiciary or in the General Assembly or in both. The Commission believes that broad management powers should be firmly vested in the judges of the State but it recognizes that there are many other matters connected with the administration of the judicial system which should not be determined solely by the judges.

Budgetary matters, the determination of salaries and pensions of judges, clerks and other court officials, the acquisition and maintenance of law libraries, and similar matters must either be determined by the General Assembly or determined in such other manner as is prescribed by the General Assembly by law. Providing for physical accommodations for courts and court officials such as courtrooms, jury rooms, clerks' offices, sheriffs' offices and other facilities usually found in court houses is also not an appropriate function of the judicial branch. These facilities today are usually provided by the counties and the City of Baltimore but they may in the future be provided by the State.

In many ways the duties and functions of all three branches of government overlap in the administration of the judicial system but this has not occasioned any irreconcilable conflicts in the past and the Commission does not believe that it will result in insurmountable problems in the future. On the other hand, the Commission believes that it should be made clear that the final and ultimate responsibility for an efficient operation of the judicial system rests with the judiciary. For these reasons, the Commission recommends that the Supreme Court by rule and the General Assembly by law have concurrent power to prescribe regulations governing administration of the courts, officers of the judicial branch, and officers of the executive branch to the extent that their duties directly relate to the enforcement of judicial orders. In the event a law and a subsequent rule providing for such administration should conflict, then the rule controls.

Within the judicial branch the primary and overall responsibility for the administration of the judicial system is placed upon the chief justice of the Supreme Court, but the chief administrative officer of the entire system is the chief judge of the Superior Court who acts under the supervision of the chief justice of the Supreme Court and is assisted in the administration of the District Courts by the chief judge of the District Court.

Early in the life of the Commission the Maryland State Bar Association ap-

pointed a special committee to work with the Commission and representatives of this committee met regularly with the Commission's Committee on the Judicial Department to discuss the Commission's recommendations.[137] This Committee reported to the 1967 mid-winter meeting of the Maryland State Bar Association and recommended the endorsement of the Commission's recommended draft article on the judicial branch. With an almost unanimous vote the Maryland State Bar Association at that meeting endorsed the basic principles of this draft article.

The Maryland Judicial Conference also appointed a committee to work with the Commission.[138] Representatives of this committee met regularly with the Commission's Committee on the Judicial Department and representatives of the Commission made a report to the Maryland Judicial Conference at its semi-annual meeting in February. The Judicial Conference also approved in principle almost all of the recommendations of this draft article.

[137] Judge Joseph Sherbow was named chairman of a 35-member committee to study the Commission's recommendations on all proposals. This committee was known as the Committee on Maryland Constitutional Revision of the Maryland State Bar Association. Judge Sherbow in turn appointed Judge J. Dudley Digges as chairman of a subcommittee to give further attention to the Commission's recommendations on the judicial branch. This subcommittee was known as the Subcommittee on Maryland Judicial System of the Maryland State Bar Association.

[138] Judge Ralph W. Powers was named chairman of a six-member subcommittee to be a liaison with the Commission. This subcommittee was known as the Subcommittee of Judges for Liaison with the Committee on the Judiciary Department of the Constitutional Convention Commission.

The Court Clerks Association[139] and the Register of Wills Association[140] each appointed committees to study the Commission's recommendations with respect to the judicial branch. Representatives of each met on occasion with the Commission's Committee on the Judicial Department and with other representatives of the Commission to discuss the Commission's recommendations.

Although the Commission's Committee on the Judicial Branch has done a great deal of work, held extensive hearings, and had numerous meetings with interested groups, the Commission has not had the personnel or means to conduct a thorough-going investigation of the operation of the present judicial system of Maryland. At the request of the Commission, such a study has been undertaken by the Institute of Judicial Administration, Inc., financed by a grant from a private foundation.[141] This study is expected to be published by September 1, 1967 and will be made available to the Constitutional Convention.

THE ORPHANS' COURTS AND REGISTERS OF WILLS

This draft article does not provide for a continuance of the orphans' courts in the judicial system of the State nor does the Commission recommend the continuance of the registers of wills as officers provided for in the Constitution. It will be for the General Assembly to prescribe by law the court and the officials in the judicial branch who are to

[139] Maryland Court Clerks' Association, Frank W. Hales, President.

[140] Maryland Register of Wills Association, Thomas L. Adams, President.

[141] The necessary funds for this study have been made available by The William G. Baker, Jr. Memorial Foundation, a Maryland foundation.

perform the probate functions now performed by the orphans' courts and the registers of wills.

The Commission contemplates, however, that the General Assembly will provide by law that the judicial and administrative duties now performed by the orphans' courts will be performed by the Superior Court and the purely administrative functions now performed by the register of wills will be performed by the clerks of the courts. The Commission has purposely not recommended for inclusion in the constitution the details of such an arrangement because it believes that in broad outline the arrangement should be prescribed by law and the details left to be worked out by rule of the Supreme Court and by administrative practice.

Although the Commission does not recommend the continuance of the registers of wills as constitutional officers, it does not at all contemplate that the existence of the registers of wills as officers of the State performing valuable and necessary administrative and semi-judicial duties will cease. Neither does the Commission anticipate that the judges of the Superior Court will be called upon to perform the numerous administrative duties now performed by the judges of the orphans' courts. What no doubt will evolve is a system under which the registers of wills, under that or some other name, will continue as the heads of divisions of the clerks' offices, and the Superior Court will no doubt delegate to administrative assistants, similar to masters in chancery and perhaps called "masters in probate," most of the administrative functions and duties now performed by judges of the orphans' courts. This will leave to the judges of the Superior Court the performance of the duties and functions of the judges of the orphans' courts which are clearly judicial in nature.

Similarly, the Commission does not contemplate that the present registers of wills and their deputies will no longer be performing their important functions after the new constitution takes effect and after their present terms of office end. The present personnel, whose experience and knowledge of probate matters acquired over a long period of years are very great, will undoubtedly be continued in office. The Commission believes that the change recommended by it will result in the increased stature for the probate division of the judicial system which its importance deserves and requires.

The Commission's recommendation that no provision be made in the new constitution for orphans' courts or registers of wills, and that all the details be determined by legislation and rule of the Supreme Court is also in part a recognition of the fact that the administration of the probate system varies widely throughout the State. What may be required in Baltimore City and the large urban counties where the probate business is of tremendous volume will differ quite substantially from what may be needed in the rural or less populated counties of the State. By leaving these matters to be determined by legislation and by rule of court, the Commission seeks to achieve the desired and necessary flexibility.

Consolidation of the orphans' courts with the court of general trial jurisdiction has been urged and recommended for more than fifty years by every group which has ever studied the probate system of the State. Time and space do not permit a full discussion of the matter here, but it is desirable to review briefly

the history of the efforts to abolish the orphans' courts in the past twenty-five years.

In 1941, upon the request of the Maryland State Bar Association, Governor Herbert R. O'Conor appointed a Commission to consider the entire judiciary article of the Constitution. The Commission consisted of fifteen distinguished jurists and lawyers and its chairman was Carroll T. Bond, Chief Judge of the Court of Appeals. This Commission, popularly known as the Bond Commission, made a thorough and comprehensive study of the State's judicial system and recommended the adoption of certain amendments to the Constitution. Among other things, the Commission unanimously recommended that the orphans' court of the State be abolished and that their probate and administrative functions be transferred to the circuit courts in the counties and to the Superior Court of Baltimore City.

The State Bar Association endorsed the Bond Commission's recommendations regarding the orphans' courts and the proceedings of the Association throughout the ensuing years reflect continued approval of the recommendations of the Bond Commission. There was, in fact, awareness that the whole probate system was in need of study and re-evaluation. Thus, in 1945 a special advisory committee on improvement of probate statutes was appointed to cooperate with the special study being undertaken at that time by a committee of the American Bar Association.

In 1947 Chief Judge Ogle Marbury of the Court of Appeals delivered an address before the State Bar Association in which he traced the history of the orphans' courts and strongly urged their abolition.[142] Judge Marbury noted that the recommendations of the Bond Commission had twice been approved by the State Bar Association, and at the conclusion of his address said:

> "[A]ll lawyers know the danger, the delay and the added expense of having legal decisions made by laymen. The average individual does not realize how much easier, how much less expensive and how much more effective would be the administration of estates under the method proposed by the Bond Commission. The average individual, as a matter of fact, does not know anything about it. But when he is made to understand that at least 90 per cent of the orders signed by Orphans' Courts are merely matters of form which could be just as easily signed by the Register of Wills, he would see no reason for paying salaries to 72 extra state officials for doing this work. And when he understands that in the remaining cases important questions of law have to be decided by individuals who have no legal training, he will begin to wonder why we have kept this system so long. The reasons which caused its adoption no longer exist, and it will be changed as soon as the public realizes that it is kept solely to provide offices."[143]

One recurring objection to the proposal of the Bond Commission was that the circuit courts would be overburdened by a transfer to them of the judicial duties of the orphans' courts. In 1948 the final report of the State Bar Association Committee on Abolishing the Orphans' Courts contained an analysis of

[142] 52 TRANSACTIONS OF THE MARYLAND STATE BAR ASSOCIATION 241-58 (1947).

[143] 52 TRANSACTIONS OF THE MARYLAND STATE BAR ASSOCIATION 258 (1947).

the volume of work of the orphans' courts and of the *nisi prius* judges in the counties and in Baltimore City. The Committee recommended that the State Bar Association take such action as was necessary to bring about the abolition of the orphans' courts, noting that:

> "As every lawyer knows, the vast majority of the work of the Orphans' Courts is administrative in character and performed by the Register of Wills. The proposal to abolish those courts comprehends no change in that respect so the slight additional work which will fall upon the county circuit judges is patently most insignificant and, when added to their existing duties, will cause little impact. So far as your Committee is advised, not a single county judge entertains any contrary opinion."[144]

In 1951 a report of another committee of the State Bar Association said:

> "While your Committee strongly advocates such abolition [of the Orphans' Courts], we are satisfied that the failure of the Legislature to pass the necessary enabling legislation is based upon political considerations which would not be satisfied by any change in constitutional procedure for determining the number of circuit or appellate judges."[145]

In a report in 1950 the State Bar Association Joint Committee on the Abolition of the Orphans' Courts and One Sitting Judge for Each County said:

> "The abolition of the Orphans' Courts and the substitution therefor of the administrative and judicial machinery as proposed in the Report of the Committee on the Abolition of the Orphans' Courts heretofore made to this Association is highly desirable and should be pressed by this Association."[146]

Article IV, Sections 20 and 40 of the present Constitution were amended in 1964 so that orphans' court judges are no longer elected in Montgomery County, and since November 8, 1966, the Circuit Court for Montgomery County has exercised all the power, authority and jurisdiction formerly exercised by the Orphans' Court of Montgomery County.

In 1966 the General Assembly considered a bill which proposed an amendment to the Constitution to permit the General Assembly to transfer the functions of the orphans' court in any county (but not in Baltimore City) to the circuit court of that county. The bill, however, was not enacted into law.

Section 5.01. **Judicial Power.**

The judicial power of the State is vested exclusively in a unified judicial system composed of the Supreme Court, the Appellate Court, the Superior Court and the District Court.

Comment:

This draft section would for the first time bring all the courts of the State into a unified judicial system. Maintenance and support of the system would become the exclusive responsibility of

[144] 53 TRANSACTIONS OF THE MARYLAND STATE BAR ASSOCIATION 121, 128 (1948).

[145] 56 TRANSACTIONS OF THE MARYLAND STATE BAR ASSOCIATION 32, 37 (1951).

[146] 55 TRANSACTIONS OF THE MARYLAND STATE BAR ASSOCIATION 267, 268 (1955).

the State. The system would be under the administrative control of the Supreme Court and its chief justice.

At the present time, particularly at the level of trial magistrate courts, the responsibility for judicial salaries, staff and quarters is an extremely complicated combination of divided state and local responsibility. Even at the level of the present circuit courts, there is a practice of local supplementation of judicial salaries which precludes uniformity. The local disparities become even greater when the staffs are considered.

With centralized control under a unified system, it is expected that a more equitable and balanced system can be achieved and maintained. This goal was one of the strongest recommendations made to the Commission by the Maryland State Bar Association's special committee appointed to work with the Commission.

The proposed structure has four levels of courts: a highest appellate court, an intermediate appellate court, a trial court of general jurisdiction, and a trial court of limited jurisdiction. The two trial courts will each be a single, statewide court, divided into various divisions.

The Supreme Court will be comparable to the present Court of Appeals. The Appellate Court is comparable to the Court of Special Appeals which was created pursuant to a constitutional amendment adopted at the 1966 general election. The function of a court at this level is to hear and thereby reduce the large number of cases which would otherwise be appealed to the Supreme Court by reason of the increase in the number of appeals, particularly in criminal cases.

The Superior Court would be a consolidation into one statewide court of all the present circuit courts of the counties and all the courts which constitute the Supreme Bench of Baltimore City. At the present time there are three separate courts in Baltimore City exercising general jurisdiction in civil law cases, two separate courts exercising general jurisdiction in equity cases, and a third court exercising general jurisdiction in criminal cases. The judges at this level in Baltimore City also comprise a seventh "court", known as the Supreme Bench of Baltimore City, which has very limited jurisdiction. The effect of the present proposal is to consolidate these separate courts with the circuit courts of the counties into a single, statewide court.

The District Court, a court of limited jurisdiction, is the court at the level comparable to the trial magistrate system, the people's courts in certain counties, and the People's Court and Municipal Court of Baltimore City. The Commission recommends that all these courts be abolished and that jurisdiction at this level be exercised by full-time judges who are attorneys and who have tenure.

A court of limited jurisdiction is of unlimited importance. Chief Justice Charles Evans Hughes pointed out that, "justice in the minor courts—the only courts that millions of our people know—administered without favoritism by men conspicuous for wisdom and probity is the best assurance of respect for our institutions."[147]

The District Court recommendation of the Commission is, in all material

[147] Quoted in AMERICAN BAR ASSOCIATION SECTION OF JUDICIAL ADMINISTRATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 95 (4th ed. 1961).

respects, consistent with the proposal overwhelmingly endorsed by the Maryland State Bar Association at its 1966 annual meeting, and with recommendations of the Maryland Judicial Conference of Judges of Courts of Limited Jurisdiction.

The Commission recommends that the present jurisdiction of the orphans' courts, which includes the supervision of the administration of decedents' estates and of guardianships, be vested in the Superior Court. At present, judges of the orphans' courts are not required to be attorneys, and often are not. Many of the duties of these courts are ministerial. Because of the limited jurisdiction of the orphans' courts, the judges of the orphans' courts often cannot deal with many of the problems which arise in cases before them. The Commission's proposal recognizes the importance of the matters dealt with by orphans' courts and recommends that they be handled in the same manner as are other complicated legal issues.

The vesting of judicial power exclusively in the four courts is not intended to limit the conferral by law of quasi-judicial functions and powers upon administrative agencies.

The Commission deliberated at length about what names should be assigned to each of the four courts. It attempted to use names which would be descriptive of the functions of the courts. There were suggestions that the historical names be retained both because of custom, familiarity, and convenience and because it might prove to be awkward to change the name of the highest court, in particular, in citations. With regard to the Appellate Court it was argued that the name "Appellate Court" might be confused with the former name of the highest appellate court, the Court of Appeals.

On the other hand, those who advocated the new names pointed out that most states[148] use the name "Supreme Court" to denote the state's highest appellate court and that, as a consequence, most citizens throughout the nation tend to refer to Maryland's highest appellate court as the "Supreme Court." Indeed, the Commission's Committee on the Judiciary Department concluded that, because of the widespread usage of "Supreme Court" elsewhere and because the name is applied to the highest court of the United States, most Marylanders themselves believe that the name of the State's highest appellate court is already the "Supreme Court."

The name "Appellate Court" was advocated and selected because it is shorter than "Intermediate Court of Appeals" or "Court of Special Appeals" and is sufficiently distinct from the "Court of Appeals" as to avoid confusion with the former name of the State's highest appellate court.

The name "Superior Court" is advocated and selected to designate the general trial court, both because the name is used widely[149] throughout the nation with regard to such state courts of general jurisdiction, and because the Commission wants to emphasize the unification of the circuit courts. Moreover, the name "circuit" would no longer be appropriate for a single statewide court. A new name is thought most appropriate for this court since it will, in fact, be a new court.

A name for the statewide court of

[148] INDEX DIGEST 275.

[149] THE BOOK OF THE STATES 114.

limited jurisdiction posed the most difficult name-giving problem of all since this court will also be an entirely new court. By the process of elimination the name "District Court" was selected and is recommended for this statewide court.

THE SUPREME COURT

Section 5.02. **Jurisdiction of Supreme Court.**

The Supreme Court shall be the highest court of the State and shall have the jurisdiction prescribed by law.

Comment:

This draft section provides that the jurisdiction of the Supreme Court shall be as prescribed by law. The Commission first considered recommending that the court's jurisdiction be only appellate. However, the Commission proposes that original jurisdiction over reapportionment and other special cases be placed in this court, and the General Assembly may want to give it original jurisdiction in other special matters. In any event, the power to remove judges, given to the Supreme Court in draft Section 5.25 may be an exercise of original jurisdiction. Since the jurisdiction is flexible, it is thought necessary to insert a statement that the Supreme Court be the highest court of the State, so that the structure can not be inverted and provision be made by law for appeals from the Supreme Court to the Appellate Court.

Some persons suggested that the recommendation that jurisdiction be prescribed by law is unwise because it would allow the General Assembly to strip the Supreme Court of jurisdiction in all cases, except in one minor area. The Commission does not believe that this is a significant danger. Article IV, Section 14 of the present Constitution now provides that the jurisdiction of the Court of Appeals shall be "as prescribed by law." In any event, to prevent a divesting of jurisdiction, the constitution would have to include a conferral of appellate jurisdiction in enumerated cases. Such an enumeration creates greater difficulty than the problem it seeks to cure.

Section 5.03. **Composition of Supreme Court.**

The Supreme Court shall be composed of seven justices. Five justices shall constitute a quorum, and the concurrence of four shall be necessary for the decision of a case.

Comment:

This draft section prescribes that the Supreme Court shall continue to be composed of seven justices. A specific number is set in the constitution to prevent "packing." A quorum of the court is set at five, and the concurrence of four is necessary for a decision. These requirements mean that the concurrence of a majority of the entire court will be needed to decide any case. The Commission does not contemplate that a panel system will be used, but rather it believes that the tradition of argument before the full court, which prevailed before the present five-member panel plan was adopted, should be restored.

The Commission's research indicates that an express provision for the issuance of writs in aid of the court's jurisdiction is unnecessary since the power is inherent in the court.

Section 5.04. **Chief Justice.**

The governor shall designate one of the justices of the Supreme Court to be chief justice for the remainder of his service on the court, or until he resigns the office of chief justice. During a vacancy in the office of chief justice, or during a period, as determined by the Supreme Court, when the chief justice is unable to serve, the associate justice senior in service on the Supreme Court shall have the powers and duties of the office of chief justice.

Comment:

Since powers and duties are vested in the office of chief justice, it seems necessary to make specific provisions for the devolution of these functions in case of vacancy or incapacity. The question of incapacity is to be determined by the majority of the justices of the Supreme Court.

This draft section empowers the governor to appoint the chief justice from the ranks of those justices serving on the court. This method of selecting the chief justice is the same as that prescribed in Article IV, Section 14 of the present Constitution. Nine other states follow the same practice of authorizing the governor to select the chief justice. In nine states the chief justice is elected in a general election. In eight states the bench of the highest court selects its own chief justice. Four states authorize their general assemblies to elect the chief justice; while in nineteen states the constitution or law designates the chief justice in terms of some characteristic of his length of service on the highest court.[150]

The Commission has heard no suggestion that the means of selecting the chief justice be altered and it, therefore, recommends that the historical means of selection be continued.

THE APPELLATE COURT

Section 5.05. **Jurisdiction of Appellate Court.**

The Appellate Court shall have the jurisdiction prescribed by law.

Comment:

This draft section, like the constitutional amendment which was adopted at the 1966 general election to establish an intermediate court of appeals, merely authorizes the General Assembly to confer jurisdiction on the Appellate Court. It is anticipated that the General Assembly will initially confer the same jurisdiction on this court as is provided for the new Court of Special Appeals.[151] However, the jurisdiction could readily be changed by law.

The Supreme Court must remain the court entrusted with the final decision on all important questions of law. From this it naturally follows that certain questions of law—those clearly not of interest to the State as a whole, or those whose determination is of interest only to the litigants—should be left for final resolution in the Appellate Court.

A fair and equitable division of labor must be maintained between the two courts so that there will be a final disposition of all cases on appeal without delay. To achieve this goal, rigid juris-

[150] The Book of the States 122.

[151] Acts of 1966, chapter 11.

dictional allocations of cases between the two courts by statute should be avoided, and authority should be vested in the Supreme Court to adjust case loads equitably by rule or by exercising its discretion.[152]

Section 5.06. **Composition of Appellate Court.**

The Appellate Court shall be composed of no fewer than five judges, as prescribed by law. The Appellate Court may sit in panels of no fewer than three judges in each case, as prescribed by rule.

Comment:

This draft section provides that the Appellate Court shall be composed of no fewer than five judges. This initial composition is the same as that of the Court of Special Appeals. The number of judges can be increased by law.

The provision for the use of panels is permissive. If panels are not used, a majority of the entire court would be needed for decision. Since panels, however, are expressly permitted without qualification as to the number needed for a decision by a panel, a majority of a panel can render a final judgment. The provision for a panel means not only that as few as three judges may sit in any case at any time, but also that the court may be divided on a regular basis into panels which serve specific geographic areas, or which hear cases involving specific subject matters.

The Commission recommends that the determination of whether, and to what extent, panels should be created should be determined by rule of the Supreme Court, following the general approach that matters of internal administration should be left to the rule-making power of the Supreme Court.

THE SUPERIOR COURT

Section 5.07. **Jurisdiction of Superior Court.**

The Superior Court shall have original jurisdiction in all judicial proceedings, except as otherwise prescribed by this Constitution or by law, and shall have such other jurisdiction as is prescribed by law. Jurisdiction of the Superior Court shall be uniform throughout the State.

Comment:

This draft section provides that the Superior Court shall be the repository of original general jurisdiction in all "judicial proceedings," which include not only general civil and criminal cases and controversies, but also probate proceedings.

It is necessary to except jurisdiction "as otherwise provided by this Constitution or by law" to complement the allocation of original jurisdiction to the Supreme Court in reapportionment and removal cases and to enable the General Assembly to confer original jurisdiction on the District Court in specified types of cases. The Commission also believes that it is desirable to provide that the Superior Court shall have such other jurisdiction as may be prescribed by law since the Superior Court will undoubtedly be vested by law with jurisdiction in cases which are not an exercise of

[152] See REPORT OF THE COMMITTEE ON JUDICIAL ADMINISTRATION, 70 TRANSACTIONS OF THE MARYLAND STATE BAR ASSOCIATION 244 (1965). For a detailed discussion on the establishment of a new intermediate court of appeals and its jurisdiction, see also REPORT OF THE COURTS COMMISSION TO THE NORTH CAROLINA GENERAL ASSEMBLY (1967).

original jurisdiction, such as appeals from the District Court and appeals from certain administrative agencies. In addition, it is unclear whether the power to review and revise criminal sentences, which may be placed in the Superior Court, is an exercise of original jurisdiction.

The requirement of uniform jurisdiction complements a similar provision for the District Court, discussed in the comment to draft Section 5.09.

Section 5.08. **Composition of Superior Court.**

The Superior Court shall be composed of the number of judges prescribed by law and the number shall be allocated among the counties by law. There shall be at least one Superior Court judge resident in each county.

Comment:

This draft section provides that the number of judges for the Superior Court shall be prescribed by law. The Commission considered and rejected a suggested provision which would limit the power of the General Assembly to create additional judgeships to instances where this was recommended by the Supreme Court or by a judicial council. The Commission believes that the creation of a unified, statewide judicial system, vested with the power to adopt its own rules of administration, makes unnecessary the adoption of a restriction upon the power of the General Assembly to create judgeships.

This draft section requires that there be at least one resident judge of the Superior Court in each county. This provision was strongly urged by the Maryland State Bar Association committee and represents the culmination of a step-by-step process in Maryland which has resulted in a resident judge of the present circuit courts in each county.

Each judgeship in the Superior Court will be allocated to a particular county in order to determine eligibility for nomination and appointment under draft Section 5.13, and the area from which the judicial candidate stands for election under draft Section 5.21. Draft Section 5.28 provides that there will be a clerk of the Superior Court in each county. Thus, in appearance, the Superior Court will be very similar to today's circuit courts in the counties.

THE DISTRICT COURT

Section 5.09. **Jurisdiction of District Court.**

The District Court shall have the original jurisdiction prescribed by law. Jurisdiction of the District Court shall be uniform throughout the State.

Comment:

This draft section provides that the jurisdiction of the District Court, both exclusive and concurrent, shall be as prescribed by law. It is contemplated that this jurisdiction will initially be very similar to that now conferred on the trial magistrates and people's courts.

The requirement of uniformity of jurisdiction is new. At the present time, particularly in the area of civil jurisdiction, the dollar amounts which may be claimed in cases tried before trial magistrates or judges of the people's courts vary widely.[153] Since the proposed court will be a unified one, the jurisdiction should be uniform.

[153] REPORT OF THE COMMITTEE ON JUDICIAL ADMINISTRATION OF THE MARYLAND STATE BAR ASSOCIATION 10-11 (1966).

The Commission considered a proposal that only exclusive jurisdiction be uniform, so that the General Assembly could make local variations in the jurisdiction which would be concurrent with that of the Superior Court, on the theory that a higher jurisdictional amount might be desirable in metropolitan areas. This proposal failed by a vote of 9 to 10.

Arguments advanced in support of the majority position were that a number of the judges of courts of limited jurisdiction saw no basis for the distinction and that, since litigants will have the option of using the District Court or the Superior Court where jurisdiction is concurrent, the same result can be achieved by setting a uniform high limit on concurrent jurisdiction.

Section 5.10. **Composition of District Court.**

The District Court shall be composed of the number of judges prescribed by law. The State shall be divided by law into districts. Each district shall be composed of one or more entire and adjoining counties. There shall be at least one District Court judge resident in each district.

Comment:

This draft section prescribes that, as in the case of the Superior Court, the number of judges is to be determined by law, but that each district of the State shall have at least one resident judge. It should be noted that the composition of this court is not oriented to the counties, but to the districts to be created by law, and to consist of one or more entire and adjoining counties. The Maryland State Bar Association study concluded that there may not be sufficient judicial business at this level to justify a full-time judge in each county,[154] and that it may be necessary to combine counties in some areas in the formation of districts. Since there is some question as to the need or desirability of having a district judge in each county, the Commission recommends that a new constitution not require that there be a district judge resident in each county, and that the General Assembly be vested with the authority and responsibility to determine the formation of judicial districts from time to time.

Section 5.11. **Commissioners.**

There may be commissioners of the District Court in the number and with the qualifications prescribed by rule. Commissioners in a district shall be appointed by and serve at the pleasure of that judge of the District Court who shall be designated by rule to appoint commissioners therein. Commissioners may exercise powers only with respect to arrest, bail, collateral and incarceration pending hearing, and then only as may be prescribed by rule.

Comment:

The Commission recommends that the office of commissioner be created to supplement the manpower of the judges of the District courts in their duties of issuing arrest warrants and taking other action pending grand jury or court action. In some areas there may be enough judges of the District Court so that there will be no difficulty in dealing quickly with these matters. However, since these functions must be performed at any time, it is necessary that there be minor judicial officers to

[154] Report of the Committee on Judicial Administration of the Maryland State Bar Association 16 (1966).

serve sections of the State in which there may not be a district judge readily available. The Commission believes that there should be constitutional authorization for these officers since their functions may be considered judicial, and all judicial power is allocated by the draft article on the judicial branch.

This draft section prescribes that the number and qualification of commissioners be determined by rule. The number of commissioners would be determined in relation to the number of hearings involved and the number and proximity of district court judges who are available in the particular locality. The rule provision permits flexibility in this determination.

The Commission is hesitant to suggest that commissioners be required to be members of the bar since there may be areas of the State in which a sufficient number of commissioners could not be obtained from among the members of the bar. Nevertheless, such a requirement might be desirable in the future, and leaving the qualifications to be determined by rule allows the Supreme Court to determine when it is appropriate to require all commissioners to be lawyers.

The Commission recommends that commissioners be appointed by a judge of the District Court since they will work directly under the supervision of judges of the District Court. The determination of which district court judge will appoint commissioners in a given area is also left to rule because it is viewed as a matter of internal administration. Since the districts are created and can be changed by law, this will give flexibility.

Restricting the commissioners' power to issuing arrest warrants, setting bail and such related matters is a deliberate limitation of their powers. Some suggestions were made that the commissioners should be empowered to hold preliminary hearings to determine if there is sufficient evidence against an arrested person to hold him for trial, and to issue search warrants. Both the Commission and those who consulted with it believe that the conduct of preliminary hearings and the issuance of search warrants are of such a serious nature as to be best left to a judge.

The express statement that commissioners may exercise powers "only as may be prescribed by rule" is recommended out of an abundance of caution to preclude any contention to the contrary.

SELECTION, TENURE AND REMOVAL OF JUDGES

Section 5.12. **Judicial Circuits.**

The State shall be divided by law into circuits of the Supreme Court and into circuits of the Appellate Court.

Comment:

This draft section assigns to the General Assembly the responsibility for dividing the State into circuits of the Supreme Court and circuits of the Appellate Court. The sole function of such circuits is to provide a geographical basis for a residency requirement for those persons appointed judges of the Supreme Court or of the Appellate Court.

The Commission debated at length the question of whether there was any reason for recommending the establishment of judicial circuits for the Supreme Court and the Appellate Court before

voting 11 to 5 in favor of recommending this draft section providing for judicial circuits. It considered the fact that forty-two states do not have appellate court circuits[155] and the argument that without circuits the members of the court may be selected from the most qualified members of the state bar regardless of their place of residence. The Commission concluded, on the other hand, that the historical precedent for appellate judicial circuits is strong, that the unevenness of the State's population distribution makes such judicial circuits desirable to ensure fairness in opportunity for membership on the appellate courts, and that judicial circuits are necessary to ensure that the appellate courts will represent and understand the people of the entire State.

It should be noted, however, that as a compromise, the Commission recommends that a new constitution be silent on the number of judicial circuits which should be provided. The Commission does not contemplate that there would necessarily be a circuit established for each judge. On the other hand, the term "circuits" is used in the plural form in this draft section to indicate that there should be at least two circuits.

Section 5.13. **Eligibility for Appointment as Judge.**

To be eligible for nomination and appointment as judge, a person shall be a citizen of the State and shall have been a member of the bar of the State for at least five years immediately prior to his nomination, and shall be a resident of the circuit where the Supreme Court or the Appellate Court vacancy exists, a resident of the district where the District Court vacancy exists, or a resident of, or have his principal office for the practice of law in, the county where the Superior Court vacancy exists.

Comment:

Three alternative statements of qualification for judicial selection were considered by the Commission. They were as follows:

ALTERNATE 1:

To be eligible for nomination and appointment to the office of judge, a person shall be a citizen of the State and have been a member of the bar of the State for no fewer than five years next prior to his nomination.

To be eligible for nomination and appointment to the Superior Court, a person shall be a resident of, or shall have his principal office for the practice of law in, the county where the vacancy exists. To be eligible for nomination and appointment to the District Court, a person shall be a resident of the district where the vacancy exists.

ALTERNATE 2:

To be eligible for nomination and appointment to the office of judge, a person shall be a citizen of the State and have been a member of the bar of the State for no fewer than five years next prior to his nomination.

The State shall be divided by law into circuits of the Supreme Court and into circuits of the Appellate Court. To be eligible for nomination and appointment to the Supreme Court or to the Appellate Court, a person shall reside in the circuit where the vacancy exists.

To be eligible for nomination and appointment to the Superior Court or

[155] THE BOOK OF THE STATES 122.

to the District Court, a person shall be a resident of the county or district, respectively, where the vacancy exists.

ALTERNATE 3:

To be eligible for nomination and appointment to the office of judge, a person shall be a citizen of the State and have been a member of the bar of the State for no fewer than five years next prior to the nomination.

The State shall be divided by law into circuits of the Supreme Court and into circuits of the Appellate Court. To be eligible for nomination and appointment to the Supreme Court or to the Appellate Court, a person shall reside in, or have his principal office for the practice of law in, the circuit where the vacancy exists.

To be eligible for nomination and appointment to the Superior Court, a person shall be a resident of, or shall have his principal office for the practice of law in, the county where the vacancy exists. To be eligible for nomination and appointment to the District Court, a person shall be a resident of the district where the vacancy exists.

Under each alternate the only required professional qualification for judicial appointment is five years of practice at the bar. Article IV, Section 2 of the present Constitution requires no minimum period of practice. The Commission believes that a requirement that a person have practiced law five years before qualifying for appointment as a judge is desirable, but points out that the key to the appointment of qualified persons as judges will lie in the careful screening of nominees by the nominating commission, and in the increased willingness of capable persons to accept appointment to judicial office because of the noncompetitive election feature. The Commission is of the opinion that a requirement that such persons be distinguished for wisdom and integrity, as is provided in the present Constitution, is of little significance.

The differences between the four plans which were considered by the Commission were the residence requirements. Under all four plans an appointee to the District Court must at the time of his appointment reside in the district to which the judicial office is allocated. Under the Commission's proposed draft section, which was adopted by a vote of 14 to 9, an appointee to an appellate court must at the time of his appointment reside in the particular appellate judicial circuit where the vacancy exists. However, under this draft section an appointee to the Superior Court may at the time of his appointment either reside in the particular county where the vacancy exists, or he may have his principal office for the practice of law there. The latter provision is new and is designed to permit capable persons to qualify for appointment to judicial office in an urban area where they have practiced law and have established their professional reputation, even though they may reside in a neighboring suburban county. Opponents of this provision assert that it violates the concept of the "resident judge" who lives among the people whose cases he adjudicates.

One of the alternative plans which was considered and rejected by the Commission omits any residence qualification for the two appellate courts, primarily to permit the selection of the most capable persons as judges without placing artificial limitations of residence upon the governor's choices. Proponents of this approach assert that the "resident

judge" concept is not fully applicable to appellate decision-making, while opponents maintain that it is desirable to require a geographical distribution of the members of an appellate court since knowledge of local variations in practice is important to appellate decision-making.

Another of the alternative plans which was considered and rejected by the Commission omits at the Superior Court level the recommended "principal office" provision which the Commission recommends as an alternate to the residence requirement. Yet another of the alternative plans extends the "principal office" alternate requirement to the two appellate courts.

Section 5.14. **Nomination and Appointment.**

A vacancy in the office of judge shall be filled by the governor from a list of no fewer than two nor more than five eligible persons nominated by a judicial nominating commission. The commission shall make nominations to fill a vacancy not more than thirty days prior to nor more than sixty days after the occurrence of the vacancy. If the governor fails to make the appointment within sixty days after receiving the list of nominees, his power to make the appointment shall end and the chief justice of the Supreme Court shall appoint one of the nominees.

Comment:

The Commission recommends the adoption of the "Missouri Plan" of judicial selection and retention.[156] The plan's principal features are the appointment of judges by the governor from a restricted list which is proposed by a nonpartisan nominating commission and subsequent ratification by a noncompetitive election. This basic approach also has been recommended by the American Judicature Society,[157] by the American Bar Association[158] and by the National Municipal League in its Model State Constitution.[159] In Missouri the plan is now applicable to the highest court, the three intermediate courts of appeal, and to certain of the trial courts in St. Louis and Kansas City.

The plan is also in effect in Alaska, Colorado, Iowa, Kansas and Nebraska; and in Birmingham, Alabama; Dade County, Florida; and Tulsa, Oklahoma. Approval of the plan is pending in Florida and Vermont.

The noncompetitive election feature of the plan is in effect in California and Illinois. Appointment by the governor from a list of nominees has beeen voluntarily used in Colorado, Pennsylvania and New York City.[160]

The "Missouri Plan" has been recommended for adoption in Maryland by the Maryland State Bar Association and by the Maryland Judicial Selection Council, Inc. It has become known in Maryland as the "Niles Plan."

Article IV, Section 5 of the present Constitution provides for judicial selec-

[156] The plan is the same as the "American Bar Association Plan," but has become known as the "Missouri Plan" since its provisions were first adopted in that State in 1940. AMERICAN BAR ASSOCIATION SECTION OF JUDICIAL ADMINISTRATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 33 (4th ed. 1961).

[157] 62 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 280-82 (1962).

[158] AMERICAN BAR ASSOCIATION SECTION OF JUDICIAL ADMINISTRATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 123 (4th ed. 1961).

[159] MODEL STATE CONSTITUTION 13, 86.

[160] 52 AMERICAN BAR ASSOCIATION JOURNAL 539-42 (1966).

tion by appointment of the governor. The governor's choice is not restricted by law; although, there has been a recent practice, not without exception, of the governor making each appointment from a list of persons recommended by a bar association. The appointed judge then serves until the first biennial general election for representatives in Congress after one year after the termination of his predecessor's tenure. At this election a successor is elected to serve a full fifteen-year term. Candidates must first run in a party primary in which cross-filing is permitted and then in a general election in which party labels are prohibited.

This draft section prescribes that when a judicial vacancy occurs, it shall be filled by the governor from a list of nominees submitted by a judicial nominating commission. The list may contain the names of no fewer than two nor more than five eligible persons. This amount of flexibility is recommended because the plan is applicable to all courts of the State. Since it is conceivable that in some areas of the State there may be at times very few lawyers whom a commission could conscientiously recommend as qualified for judicial appointment, it is recommended that the minimum number of nominees required be set at two. On the other hand, a maximum number of five nominees is recommended since a list of nominees would diminish in quality as it becomes longer.

This draft section provides that should the governor fail to appoint someone to fill a vacancy within a reasonable period of time, the power to fill the vacancy is transferred to the chief justice. The Commission believes that this provision is desirable; although, it thinks it highly unlikely that such a situation will arise.

The selection of judges must be directed towards placing on the bench men with the highest possible qualities of character, integrity, judicial temperament and learning. Lawyers seeking to serve in the judiciary must be selected on their merit. The public must have confidence that justice is not denied as a result of political bias or pressure. A strong and independent judiciary is a bulwark of democracy.

In the process of their selection, as well as in their work and tenure, judges must be free of all collateral influence and partisan political pressures. Of course, no method of selecting judges is completely free of politics and, indeed, should not be. However, popular election of judges in a campaign between political parties seems the least desirable method of attaining the goal of a strong and independent judiciary. The selection of judges in a partisan political election does little to ensure the selection of the best qualified persons.

In its report of March, 1967, the Special Committee on the Constitutional Convention of the Association of the Bar of the City of New York stated that "changing New York's present method of selecting judges would, even if no other action were taken, bring enduring distinction to the Constitutional Convention of 1967."[161]

[161] REPORT OF THE SPECIAL COMMITTEE ON THE CONSTITUTIONAL CONVENTION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SELECTION OF JUDGES 1 (1967).

Section 5.15. **Appellate Courts Nominating Commission.**

Nominations to fill a vacancy on the Supreme Court or on the Appellate Court shall be made by the Appellate Courts Nominating Commission. The commission shall be composed of six lay persons, six lawyers, and the chief justice of the Supreme Court. The terms of the non-judicial members shall be four years.

Comment:

The Commission recommends that the composition of nominating commissions be based upon a formula of an equal number of laymen and lawyers, and one judge. In recommending the "Missouri Plan" for judicial selection in the past, the Maryland State Bar Association has specifically voted to recommend that a judge be included on each nominating commission.

Some persons have indicated to the Commission that many lawyers feel strongly that the presence of a judge on a nominating commission will result in the domination of the deliberations by the judge. The Commission, however, believes that by establishing the number of members of the Appellate Courts Nominating Commission at thirteen, and the minimum number of members of a trial courts nominating commission at five, the influence of the judicial member will be minimized. Also, the provision of draft Section 5.20 which authorizes each commission to elect one of its members as chairman, should have the same effect. The Commission also believes that the advantage of having on the commission a judge, who has had the opportunity of observing the largest number of lawyers, far outweighs any possible disadvantage.

This draft section creates a single nominating commission, statewide in composition, for both appellate courts. The membership of the Appellate Courts Nominating Commission is fixed at thirteen because this number is considered sufficiently large to be representative of the entire State and because stabilizing the number will tend to prevent "packing."

This draft section sets the terms of the non-judicial members at four years. The Commission recommends that the initial terms be staggered by the schedule to a new constitution. The Commission does not believe it necessary to require districting for the members of this nominating commission. Political factors will compel the governor to appoint to the nominating commission lay persons who reside in different areas of the State, and districting could be required by rule for lawyer members.

Section 5.16. **Trial Courts Nominating Commission.**

Nominations to fill a vacancy on the Superior Court and on the District Court shall be made by a trial courts nominating commission. The number and composition of trial courts nominating commissions and the terms of their members shall be prescribed by law, but each commission shall have no fewer than five members and shall be composed of an equal number of lay and lawyer members, and a judge. Each commission shall make nominations to fill vacancies on the Superior Court in one or more counties, or on the District Court in one or more districts, or both, as prescribed by law.

Comment:

This draft section authorizes the creation of such number of trial courts nominating commissions as may be prescribed by law. The trial courts nominating procedure is of necessity more flexible. Since the Superior Court is oriented to the counties, it may be desirable to have a nominating commission for a single county, or for a group of counties or, on the other hand, it might be desirable to have the same nominating commission for the entire Superior Court.

Similarly, it may be desirable to have a nominating commission for a single district of the District Court, or it may be desirable to have a nominating commission for more than one district. Since the boundaries of District Court districts must coincide with county boundaries, the General Assembly may conclude that it is desirable for the same nominating commission to serve both a district or districts for the District Court and a county or number of counties for the Superior Court.

A trial courts nominating commission must be composed of at least five persons, including an equal number of lawyers and laymen, and one judge. A low minimum membership is recommended because of possible difficulty in securing the services of capable persons in the less populous areas of the State due to their hesitancy to accept appointment to a commission by virtue of which they would be disqualified under draft Section 5.20 from being appointed to any public office during, and for six months after, service on the nominating commission.

For the same reason, the term of membership on trial courts nominating commissions is left for determination by statute. Thus, the terms may be shorter in some areas than in others in order to attract the most capable persons.

Section 5.17. **Lawyer Members of Nominating Commission.**

Lawyer members of the Appellate Courts Nominating Commission shall be elected by lawyers throughout the State. Lawyer members of each trial courts nominating commission shall be elected by the lawyers of the area for which such commission is established. Eligibility and elections of lawyer members of nominating commissions and eligibility of their electors shall be governed by rule.

Comment:

This draft section prescribes that the lawyer members of the Appellate Courts Nominating Commission shall be elected by the lawyers throughout the State and that the lawyer members of each trial courts nominating commission shall be elected by the lawyers of the area for which a particular commission is established. The Commission recommends that the determination of the eligibility of lawyers for membership on a nominating commission, the eligibility of their electors, and all details in regard to the required electors be governed by rule of the Supreme Court.

Section 5.18. **Lay Members of Nominating Commission.**

Lay members of the Appellate Courts Nominating Commission shall be appointed by the governor from the qualified voters of the State. Lay members of each trial courts nominating commission shall be appointed by the governor from the qualified voters of the area for which such commission is established.

Comment:

This draft section provides that lay members of nominating commissions shall be appointed by the governor. This provision gives the governor the power to appoint almost half of each commission and it recognizes the importance to the general public of judicial appointments by placing on each commission persons who in no way represent the bar.

Section 5.19. **Judicial Member of Nominating Commission.**

The judicial member of a trial courts nominating commission shall be selected in the manner prescribed by law.

Comment:

This draft section prescribes that the General Assembly shall determine the method by which the judicial member of a trial courts nominating commission is to be selected. It should be noted that draft Section 5.15 provides that the chief justice of the Supreme Court shall be the judicial member of the Appellate Courts Nominating Commission.

Section 5.20. **Rules Governing Nominating Commission.**

A nominating commission may act only upon the concurrence of a majority of its members. Each commission shall elect one of its members as chairman. A non-judicial member of a commission may not hold any state or local public office of profit or office in a political party while a member of a commission and for six months thereafter. A member of a commission shall receive no compensation for his service.

Comment:

This draft section requires that the selection of judicial nominees be determined upon the concurrence of a majority of the members of a nominating commission. This would preclude the nomination of a person for judge by either of the non-judicial groups of members acting alone.

The Commission believes that the prohibition against a member of a nominating commission holding any public office of profit, or office in a political party, until the seventh month after termination of his commission membership is desirable to protect the integrity of a commission. The prohibition is designed to discourage the making of an arrangement by which a member of a nominating commission is given a political appointment in exchange for his vote to nominate a particular person for a judicial office. The National Municipal League suggests that the length of the disqualification period should run as high as five years.[162] The Commission considers its recommendation of six months to be the shortest that would serve any real deterrent value.

The provision of this draft section prohibiting salary or compensation for service on a nominating commission is not intended to prohibit the payment of actual out-of-pocket expenses.

[162] Model State Constitution 84-85.

Section 5.21. **Term of Office of Judge.**

At the next general election following the expiration of two years from the date of appointment, and every ten years thereafter so long as he retains his office, each judge shall be subject to approval or rejection by the electorate. Each justice of the Supreme Court and each judge of the Appellate Court shall be subject to approval or rejection by the electorate of the entire State. Each judge of the Superior Court and of the District Court shall be subject to approval or rejection by the electorate of the county or district, respectively, for which the office then exists. Provision may be made by rule for the taking of a poll of the lawyers of the area in which the judge is required to stand for election as to whether he should be retained in office for a full or additional term, and for publication of the results thereof. In the event of the rejection of a judge by the electorate, the office shall be vacant.

Comment:

This draft section prescribes that upon his appointment, each judge will serve a "probationary" term of from two years to just less than four years before standing for election. During this "probationary" term the bar and general public can evaluate the performance of the new judge and determine whether he should be retained in office.

As indicated in the comment to draft Section 5.14, an essential feature of the plan of judicial selection and tenure recommended by the Commission is the noncompetitive election in which the judge runs "against his record" but has no opponent. The question of competitive versus noncompetitive elections for judges was debated at length by the Commission and the recommendation for a noncompetitive election was approved by a vote of 19 to 3. The overwhelming majority of the Commission believe that the noncompetitive election is necessary in order to attract the best qualified persons to service on the bench.

The Commission recommends that a new constitution establish a uniform elective term of ten years for all judicial offices. The present Constitution provides the following terms of office: of judges of the Court of Appeals, circuit courts, and of the Supreme Bench of Baltimore City, fifteen years; of judges of the orphans' courts, four years; of judges of the People's Court of Baltimore City, eight years; of judges of the Municipal Court of Baltimore City, ten years; of trial magistrates, two years.

The term of office of fifteen years which is now provided by the Constitution for members of the Court of Appeals, circuit courts and the various courts of Baltimore City is the second longest term of years provided in any state constitution in the country in which judges are elected.[163]

The Commission deliberated at length on the question of the most desirable length for judicial tenure before adopting the recommendation by a vote of 15 to 8 that a new state constitution provide a uniform ten-year term for all judges. The Commission rejected a proposal that the term of office for judges be established at fourteen years. A later motion to reconsider the question of judicial tenure was defeated by a substantial margin.

Tenure is a significant factor affecting the attractiveness of judicial office. In

[163] For general information on the term of judges of the several courts of the fifty states, see THE BOOK OF THE STATES 114.

the federal courts and in a few states, judges hold office for life or during good behavior. However, there is no ideal duration for judicial tenure. As a general principle, tenure should be long enough to safeguard the independence of the judiciary and to attract highly qualified personnel. Only when a judge is confident of his position for a reasonably long period of time can the people expect a successful lawyer to give up a profitable law practice in order to ascend the Bench. It is an unfortunate fact that those who do give up their law practices to ascend the Bench must make a substantial financial sacrifice. The price of unswerving devotion to justice ought not to be exacted from the judge alone. On the other hand, it is probably unwise to establish an indefinite period of judicial tenure, since judges, like other humans, sometimes fail to recognize their own limitations and desire to continue serving the public long after their capacities have declined. More importantly, judicial tenure should be limited to give voice to the will of the electorate. Judges who do not perform their functions adequately should be removed.

The "Missouri Plan" for judicial selection is thought to satisfy these considerations to a large extent. The appointed judge is subject to approval or rejection by the electorate at the next general election following the expiration of "three years" from the date of appointment and every ten years thereafter so long as he retains his office.[164]

The proponents of a judicial term of fourteen years contend that any reduction from the fifteen-year term will significantly reduce the number of persons willing to accept appointment to judicial office since it will discourage the most capable persons from accepting judicial appointment. The proponents of a fourteen-year term believe that even a noncompetitive election presents a big risk to a judge since an organized and militant minority in the community can secure the defeat of a judge with the result that this risk restricts the independence of a judge in deciding a case which involves a local issue of wide public interest.

The Commission believes, however, that a noncompetitive election is tantamount to re-election for most judges unless a particular judge does not deserve to be retained. The Commission also believes that it is meaningless to provide for judicial elections by the people and at the same time provide judicial terms which are so long that, considering the age at which a person is usually appointed to the Bench, the appointment in most cases means appointment for life.

This draft section also provides that the Supreme Court may provide by rule for a poll among the lawyers of the area in which a judge is required to stand for election as to whether he should be retained in office for a full or additional term, and for the publication of the results. Such a procedure has worked well in Alaska and Missouri. Since the lawyers within the jurisdiction of a particular court would be the ones most familiar with the performance of a judge of that court, the Supreme Court may deem it desirable, as a matter of public education, to require such polls and the publication of the results. However, the Commission is hesitant to recommend that such polls be made mandatory because of the lack of experience in Maryland with similar procedures.

[164] American Bar Association Section of Judicial Administration, The Improvement of Criminal Justice 124 (4th ed. 1961).

This draft section provides that the electorate of the area in which a trial court judge is required to reside (or practice) when appointed, is the electorate entitled to vote on his retention or rejection. On the other hand, although the residence requirements for judges of the two appellate courts are in terms of judicial circuits, their election is provided to be by the voters of the entire State. The Commission believes it desirable for the entire electorate of the State to decide whether to retain those judges whose decisions will make statewide law.

Section 5.22. **Retirement of Judge.**

Each judge shall retire at the age of seventy. The chief justice of the Supreme Court, with the approval of a majority of the members of that court, may authorize a retired judge temporarily to perform judicial duties in any court.

Comment:

This draft section prescribes compulsory retirement for judges at the age of seventy but permits the temporary use of retired judges. Article IV, Section 3 of the present Constitution now requires compulsory retirement for judges at age seventy and the present Constitution does not permit the temporary use of retired judges, even on a selective basis.

Compulsory retirement has been criticized by some as automatically depriving the State of the services of some of its most capable judges when they are fully able to continue rendering valuable judicial service. On the other hand, opponents of the temporary use of retired judges contend that there should be a point in time when judges should step aside and give an opportunity to younger men to take office. They also assert that there is a tendency on the part of judges of long service to become set in their ways and to resist trends toward modernization in judicial administration, in trial techniques and in the evolution of the law itself. They object to permitting the temporary use of retired judges even for special cases since they, the opponents, believe that the chief justice would be reluctant to tell a former colleague, who may be urging his appointment for limited service, that he is no longer capable of trying and deciding cases.

The Commission believes its recommendation to be a desirable compromise between these two positions. The mandatory retirement is retained. However, there is authorization for the use of retired judges on a selective and individual basis. The authority may be exercised only with the approval of the majority of the Supreme Court. This provision is designed to insulate the chief justice from the problems which might arise from his personal relationship with a retired judge.

Although the chief justice is given broad power to assign judges throughout the unified judicial system, the Commission believes that the power to use retired judges may be a useful tool in judicial administration to help relieve temporary court congestion without the necessity of creating additional judgeships.

The Maryland State Bar Association, by a relatively close vote, has recommended the use of retired judges to sit only as appellate judges. The Commission rejected a similarly limited proposal by a vote of 13 to 9.

Section 5.23. **Compensation of Judge.**

Each judge shall be compensated for his judicial service solely by the State and his salary shall not be reduced during his continuance in office. A pension payable to a retired judge or his surviving spouse pursuant to provisions in effect during his continuance in office shall not be reduced. All judges of the same court shall be paid the same compensation, including any pension based upon length of service, except that a uniform reduction in compensation may be made applicable to all judges of the same court appointed after the effective date of the reduction.

Comment:

As has been noted elsewhere in this Report, the Commission recommends that no salaries of public officers be fixed in the constitution, but instead that these be left to be prescribed from time to time by the General Assembly by law. The same is true as to pensions. For this reason, this draft article does not contain any provision fixing the amount of judicial salaries or pensions. To preserve the complete independence of the judiciary, the Commission does recommend that there be included in this draft section a provision that a judge's salary shall not be reduced during his continuance in office and that a pension payable to a retired judge or his surviving spouse pursuant to provisions in effect during his continuance in office shall not be reduced. This is in accord with the last sentence of draft Section 6.07 which provides that the compensation of a public officer may not be decreased during his term of office.

This draft section provides that each judge shall be compensated for his judicial service solely by the State. This recommendation embodies the view of a majority of the judges, and the nearly unanimous view of all interested persons other than judges, that the practice of supplementation of judicial salaries by local governments should be discontinued and hereafter prohibited.

The Commission's recommendation is in keeping with the first two principal recommendations of the Judicial Salary and Pension Review Board which was appointed in 1966 by Governor J. Millard Tawes pursuant to Joint Resolution 67, passed by the Maryland General Assembly at its 1966 session. Specifically, these two recommendations of the Judicial Salary and Pension Review Board are:

1. A uniform statewide salary and pension system should be established for the judges of the Court of Appeals, Court of Special Appeals and the circuit courts for the various counties and the courts of Baltimore City.

2. These salaries and pensions should be paid exclusively by the State with an express prohibition against supplementation of either salaries or pensions by local political subdivisions.

The present salaries of judges of the circuit courts and of the courts of Baltimore City, and the amount of local supplementation are set forth in a table in the report of the Judicial Salary and Pension Review Board.[165]

The last sentence of this draft section requires the payment of uniform salaries and pensions to all judges of the same court; that is to say, for instance, that each of the judges of the Supreme Court shall be paid the same compensation as

[165] Report of the Maryland Judicial Salary and Pension Review Board 7 (1967).

other judges of the Supreme Court, but not necessarily the same compensation as should be paid to judges of the Appellate Court, the Superior Court, or the District Court. The same rule would apply to pensions based upon length of service.

As written, this draft section would prevent the payment to a chief judge of a salary larger than that paid to the associate judges of the same court. It has been the practice in Maryland in some instances to compensate the chief judge of a court at a higher rate than the associate judges of the same court, but none of the former chief judges with whom the Commission consulted recommended the continuation of this custom.

Also, it is probable that the general trend of judges' salaries, as with all other salaries, will be upward, but a major depression could make it necessary for the State to reduce the salaries paid to its judges and other officers and employees. The salary of a judge cannot be reduced during his continuance in office, but this should not prevent the General Assembly from reducing the salaries payable generally to judges not then appointed. To make this possible notwithstanding the requirements of uniformity of judges' salaries, the last clause has been added to this draft section.

Section 5.24. **Restriction of Non-Judicial Activities.**

No judge shall engage in the practice of law, or run for elective office other than the judicial office he then holds, or make any contribution to or hold any office in a political party or organization, or take part in any partisan political campaign, or receive any remuneration for his judicial service except as provided herein. No retired judge while engaging in such activities shall be paid any pension for his judicial service.

Comment:

This draft section places severe restrictions upon the non-judicial activities of judges. Most of these restrictions are in keeping with the Canons of Judicial Ethics promulgated by the American Bar Association.[166] Their purpose, of course, is to make certain that the judge is completely free of the pressures of partisan politics and can give his undivided attention to the performance of his judicial duties.

The Commission gave consideration to the inclusion in this draft section of additional specific restrictions on non-judicial activities of judges, but decided not to do so. The Commission believes, that the Canons of Judicial Ethics will be a sufficient safeguard against participation by judges in improper non-judicial activities.

The Commission also discussed at some length the necessity for the restriction embodied in the last sentence of this draft section, and the view was expressed by a substantial minority of the members of the Commission that a retired judge should be free of all restrictions and that his pension was compensation for services previously rendered and should not be conditioned upon his nonparticipation in activities prohibited to a judge. A majority of the Commission, however, believed that the tradition in Maryland was that a retired judge should not receive a pension while he engages in the practice of law or participates in partisan political activities, particularly if he may be subject to recall for temporary service on the bench.

[166] 4 MARTINDALE-HUBBELL LAW DIRECTORY 189A (1967).

Section 5.25. **Removal of Judge.**

The Supreme Court shall have power, after hearing, to remove any judge from office upon a finding of misconduct in office or persistent failure to perform the duties of his office, or to retire any judge upon a finding of disability seriously interfering with the performance of his duties which is, or is likely to become, of a permanent character. A justice shall not sit in any hearing involving his own removal or retirement. Implementation and enforcement of this section may be by rule or order of the Supreme Court. A judge retired under this section shall have the rights and privileges prescribed by law for other retired judges. A judge removed under this section, and his surviving spouse, shall have the rights and privileges accruing from his judicial service only to the extent prescribed by the order of removal.

Comment:

Article IV, Section 4 of the present Constitution was amended in 1966 by adding Sections 4A and 4B to create a Commission on Judicial Disabilities to review cases of judicial misconduct in office, persistent failure by a judge to perform the duties of his office, judicial conduct which prejudices the proper administration of justice, or the disability of a judge which seriously interferes with the performance of his duties. After completing its review, the Commission on Judicial Disabilities makes its recommendations for the removal or retirement of a judge to the General Assembly which is required to review the record of the proceedings on the law and the facts. The removal or retirement of the judge may then be ordered by joint resolution of the General Assembly passed by a two-thirds vote of the members elected to each house.

This amendment was based upon a recommendation of the Maryland State Bar Association[167] which, however, had proposed placing the power of removal or retirement in the Court of Appeals. This draft section vests the power to remove or retire a judge in the Supreme Court rather than in the General Assembly.[168] It also vests in the Supreme Court the Power to provide by rule or order for the implementation and enforcement of this draft section. This latter provision is purposely made broad in order to give the widest possible latitude to the Supreme Court to provide by rule applicable generally in all cases, or by order applicable in a specific case, all the details necessary to implement the provisions of this draft section.

Although the power of removal is vested solely in the Supreme Court and any judge sought to be removed is entitled to a hearing before the Supreme Court, the Commission nevertheless contemplates that the Supreme Court will by rule establish a commission of some sort for the purpose of receiving and reviewing preliminary complaints against judges and with the responsibility for recommending formal removal proceedings should the evidence justify such a recommendation. A commission of this sort could be composed of other judges or of lawyers and judges, or could even include laymen. It could function in somewhat the same manner as does a

[167] 69 TRANSACTIONS OF MARYLAND STATE BAR ASSOCIATION 401-407 (1964).

[168] For a review of a similar procedure in another state, see REPORT OF THE SPECIAL COMMITTEE ON THE CONSTITUTIONAL CONVENTION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REMOVAL OF JUDGES (1967).

grievance committee of a bar association.

The Commission recommends that upon an order for the removal of a judge, the Supreme Court be authorized to determine to what extent, if at all, any accrued pension should be paid to the judge or to his spouse. The present constitutional provision requires that upon the removal of a judge there be an absolute termination of all retirement benefits. The Commission believes that this automatic forfeiture may be too harsh in some cases, particularly upon the spouse, and recommends that the determination of pension rights should be left to the discretion of the Supreme Court to be exercised on a case-by-case basis.

ADMINISTRATION

Section 5.26. **Administrative Functions of Chief Justice.**

The chief justice of the Supreme Court shall be the administrative head of the judicial system. He shall designate one Appellate Court judge, one Superior Court judge and one District Court judge as chief judges of their respective courts. Each shall serve as chief judge at the pleasure of the chief justice. The chief justice shall have the power to assign any judge to sit temporarily in any court.

Comment:

The chief justice of the Supreme Court is the administrative head of the entire judicial system under this draft section. It and the three draft sections which follow provide the key to the efficient functioning of the judicial system and the powers which they confer are intentionally very broad.

The Commission was advised that although Article IV, Section 18A of the present Constitution contains words of similar import, there has been some question in the past as to the extent of the power intended to be conferred upon the chief judge of the Court of Appeals. However, after extensive discussion with persons who have been directly involved with the problems of judicial administration in Maryland for a number of years, the Commission concluded that by designating the chief jutice as the administrative head of the courts and by giving complete administrative rule-making power to the highest court for the first time, the chief justice will be ensured having the necessary tools for effective judicial administration.

Although there may be an "uncharted area" in delineating between which decisions the chief justice can make as administrative head and what decisions require the adoption of a rule by the concurrence of a majority of the justices of the Supreme Court, the Commission believes that such a problem is more theoretical than real since in cases where the chief justice is in doubt as to the extent of his power or when he ventures into an uncharted area, he will undoubtedly consult with the entire court and rules will be promulgated.

This draft section also authorizes the chief justice to assign any judge to sit temporarily in any court. Power to assign judges to sit temporarily in any court is a power allocated to the chief judge of the Court of Appeals by Article IV, Section 18A of the present Constitution. However, the creation of the District Court broadens the scope of this power.

The American Bar Association has advocated for many years that a single judge be authorized to assign the other judges to judicial service. In 1938 the American Bar Association recommended:

> "[P]rovision should be made in each state for a unified judicial system with power and responsibility in one of the judges to assign judges to judicial service so as to relieve congestion of dockets and utilize the available judges to best advantage."[169]

The power which this draft section allocates to the chief justice is broad enough to enable the chief justice to assign a judge of the Superior Court to sit temporarily in the District Court. The Commission believes that such power is a necessary consequence of the unification of the judicial system with its concomitant elimination of the trial magistrates system and the creation of a full-time District Court. However, the Commission believes that the occasions when a judge of the Superior Court would be assigned to sit temporarily on the District Court would be very rare.

This draft section also confers upon the chief justice of the Supreme Court the power to designate the chief judges of the Appellate Court, the Superior Court and the District Court, each of whom serves as chief judge at the pleasure of the chief justice. This provision further serves to implement the first sentence of this draft section which makes the chief justice the administrative head of the entire judicial system. As such administrative head he should be responsible for the efficient administration of the system. He cannot properly be held responsible unless he has the complete power to designate, and to remove at pleasure, his chief subordinates in the administration of the judicial system. A similar philosophy with respect to the organization of the executive branch is discussed in the introductory comment to draft Article IV and the comment to draft Section 4.20.

Section 5.27. **Administrative Functions of Chief Judges.**

The chief judge of the Appellate Court shall assist the chief justice in the administration of the Appellate Court. The chief judge of the Superior Court shall assist the chief justice in the administration of the judicial system and shall perform such duties in connection therewith as are assigned him by the chief justice. The chief judge of the District Court shall assist the chief judge of the Superior Court in the administration of the District Court.

Comment:

As administrative head of the judicial system the chief justice of the Supreme Court will directly administer the Supreme Court. He cannot, however, personally administer each of the other courts under his jurisdiction and, accordingly, this draft section provides that he shall be assisted in the administration of the Appellate Court by the chief judge of the Appellate Court and in the administration of the judicial system as a whole by the chief judge of the Superior Court. In turn the chief judge of the Superior Court will be assisted by the chief judge of the District Court in the administration of the District Court.

This recommendation of the Commission contemplates that the chief

[169] 63 AMERICAN BAR ASSOCIATION REPORT 523 (1938).

administrative judge of the entire judicial system will be the chief judge of the Superior Court. His duties as such will no doubt require his full time and attention and he will probably not be able to devote time to the trial of cases or the performance of other judicial duties. Because of the great volume of cases which the District Court will probably handle and because of the difference in administrative problems in the administration of the District Court and the Superior Court, the Commission recommends that there be a separate chief judge of the District Court directly responsible for the administration of that court, but acting under the supervision and direction of the chief judge of the Superior Court.

With one chief judge for the Superior Court in the entire State it is obvious that it will be necessary to make provision for local administration by a designated judge in those areas where there is more than one Superior Court judge. The Commission contemplates that the Supreme Court will by rule provide for a designated judge to perform such function in each area where there are more than one or two judges. Such designated judge may be called the "president judge," the "presiding judge," the "senior judge" or given some other designation. The Commission contemplates that there will be some such designated judge in Baltimore City and in each of the populous urban counties. The Commission believes, however, that all such details can best be regulated by rule of the Supreme Court.

The Commission discussed at length the question of whether the chief judge of the Superior Court should be a judge in fact or a career administrator and concluded that the administrative judge should be selected from the ranks of the trial judges since a person who has actually sat as a trial judge and has the title of chief judge is more likely to command the respect of the other trial judges. Other states have also concluded that the administration of the courts should be in the hands of an experienced judge.[170]

The administrative judge should be responsible for all the "housekeeping" or non-judicial operations of the judicial system. Thus, other judges would be freed from such burdensome tasks as the recruitment, training and supervision of personnel such as clerks, secretaries, court reporters, bailiffs, and the like. The administrative judge will manage the financial affairs of the judiciary including the preparation of the budget for the judicial branch and the supervision of expenditures. The physical facilities of the judiciary will be his domain and this is by no means an unimportant item. Many courts have found themselves outgrowing available space as new judges are added or visiting judges assist in tackling large backlogs of cases. The administrative judge will be responsible for anticipating such growth and for securing appropriations for new facilities.[171]

In keeping with the Commission's recommendation that the State's judicial system be operated exclusively by the State, the Commission recommends that there be a single budget prepared annually for the entire judicial system, with full payment of the costs by the State. The Commission's research leads it to believe that the cost to the State

[170] INDEX DIGEST 198.

[171] Under draft Section 6.05 the chief judge of the Superior Court will certify the budget for the judicial branch. The Commission contemplates that the budget will be prepared under his supervision.

of operating a unified judicial system will not greatly exceed its present expenditures for the judicial branch. This recommendation is similar to that which has been made to the present Constitutional Convention in New York State by the Special Committee on the Constitutional Convention of the Association of the Bar of the City of New York.[172]

Section 5.28. **Clerks of Court.**

The chief justice of the Supreme Court and the chief judges of the Appellate, Superior and District courts shall each appoint a chief clerk of his court who shall serve at the pleasure of the appointing judge. There shall be a clerk of the Superior Court in each county and of the District Court in each district. Their appointment and terms shall be governed by rule.

Comment:

This draft section would effect a substantial change in the manner of selecting clerks of courts. Clerks of the circuit courts are now elected. The clerks of the present Court of Appeals and of the Court of Special Appeals are appointed by and serve at the pleasure of the respective courts. Clerks of the people's courts and persons performing the functions of clerks for trial magistrates are generally appointed.

This draft section provides that the chief judges of each court shall appoint a chief clerk for his court who shall serve at the pleasure of the appointing judge. All other clerks are to be appointed in accordance with a rule adopted by the Supreme Court. These recommendations are based upon the policy that since a clerk of the court is an arm of the court which he serves, he should be responsible to the judiciary of that court.

The Commission recommends that there be a chief clerk of each of the statewide trial courts in addition to the clerks prescribed for each of the Appellate Courts. In addition, this draft section provides that the Superior Court shall have a clerk in each county and the District Court shall have a clerk in each district.

Clerks' offices are an integral and very important part of the judicial system. There must be a clerk's office in each local jurisdiction where there is a court and the head of each of these clerk's offices must have a large measure of autonomy in the operation of his particular office. At the same time, the concept of a statewide court requires that there also be one statewide clerk with control over the operation of each of the clerk's offices so that he can effect a uniform system of management and record keeping. The Commission believes the achievement of both of these objectives can be obtained by having a chief clerk for each statewide court and by having a clerk of each court resident in each county or in each district as the case may be.

Of course, each of the clerks will be assisted by deputy clerks, the number of which will vary depending upon the volume of business handled by the respective clerks' offices. These deputy clerks should, and probably will be under the merit system and the Commission has deliberately not undertaken to spell out in detail all the arrangements as

[172] Report of the Special Committee on the Constitutional Convention of the Association of the Bar of the City of New York, Court Structure and Management 1, 9 (1967).

to the control of the clerks' offices, the expenditure of the funds by them, the collection of fines, and other numerous details. Nor has the Commission deemed it necessary to provide explicitly which of these details shall be prescribed by law and which by rule. Instead, under draft Section 5.29, the General Assembly by law and the Supreme Court by rule will have concurrent power to prescribe these details. The Commission anticipates no difficulty in the actual application of this recommendation.

Section 5.29. **Rule-Making Power.**

Except as to matters specifically provided to be prescribed by rule, the Supreme Court by rule and the General Assembly by law shall have concurrent power to prescribe regulations governing practice and procedure in all courts, governing the admission of persons to practice law in this State and the discipline of persons so admitted, and governing administration of the courts, officers of the judicial branch and officers of the executive branch, to the extent that their duties directly relate to the enforcement of judicial orders. In the event a rule and a law prescribing a regulation of any of the three foregoing classes conflict, the rule, if adopted or readopted after the enactment of the law, shall take precedence over the prior law to the extent of the conflict. "Rule" as used in this Article means a rule adopted by the Supreme Court.

Comment:

An efficient judicial system in Maryland will require some degree of centralized administrative control at the state level. This is particularly true where rules of procedure are involved. Certainly, procedure should be uniform throughout the State.

The Commission believes that the highest court of a state is without a doubt in the best position to evaluate the procedural needs of the whole system and it is best able to call upon expert assistance and to coordinate research, consultation, drafting and, with the help of the Bar, the public relations activities essential to effective rule-making. Furthermore, the highest court speaks with authority sufficient to carry forward needed reforms of procedure. Other jurisdictions which have adopted the integrated judicial system and which have established an administrative office of the courts have found that the rule-making function is best suited to the state's highest court.

The American Bar Association has stated that:

> "[P]ractice and procedure in the court should be regulated by rules of court, and
>
> ". . . to this end the courts should be given full rule-making powers."[173]

The goal of all reform of judicial administration is the prompt and just disposition of cases on the merits, both at the trial and appellate levels. The most important single device for achieving this objective is a simplified, reasonably flexible system. Without it, other judicial reforms, no matter how well conceived, will in all likelihood founder in the bog of procedural complexity. On principle and precedent the power to establish rules of practice and procedure should be allocated to the courts.

Despite the evident logic of entrusting to the courts control over their own

[173] 63 AMERICAN BAR ASSOCIATION REPORTS 523 (1938).

practice and procedure, the wisdom of judicial rule-making is by no means universally accepted by legislators, who often believe that rules of practice and procedure should be determined by the state legislatures. With characteristic simplicity, Judge Cardozo summed up the inherent weakness of legislative rule-making:

> "The Legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, catches the fabric here and there, and mars often when it would mend."[174]

This draft section recognizes that as a matter of policy both the legislative and judicial branches have an interest in determining practice and procedure, regulation of the Bar and administration of the courts. It also recognizes the practical necessity of allocating power both to the General Assembly and the Supreme Court since it is almost impossible to draft legislation which is purely substantive and which is no way procedural.

Under this draft section as well as under Article IV, Sections 18 and 18A of the present Constitution, relating to procedural rules, a rule of the Supreme Court could repeal a statute or a statute could repeal a rule, theoretically in an infinite chain. In the few instances in the past where the General Assembly has proposed or enacted a law relating to practice and procedure which conflicted with a rule adopted by the Court of Appeals, the conflict has been resolved in favor of the rule by consultation and agreement between the two branches of the government.

The Commission believes that judicial administration, in the broadest sense, is primarily the responsibility of the courts and, therefore, the paramount power to resolve issues relating thereto should not be placed in the General Assembly. At the same time, public interest and convenience can be deeply involved in these matters and are better expressed by the General Assembly.

As a result, the Commission recommends that the assignment of concurrent power be continued as to rules of practice and procedure, rules governing admission to the Bar, and rules of judicial administration. The Commission believes that the system of concurrent power has worked satisfactorily in Maryland in the past and that there is little reason to believe that it will have difficulty in working well in the future. However, the Commission recommends that in the event a statute and a subsequent rule conflict, the rule shall control.

The Commission contemplates that rules will provide for particular divisions of the trial courts to hear special types of cases, such as criminal, traffic, domestic relations, juvenile, general equity, administrative appeals and so forth. Other rules would lay down the standards regulating the hours of court, the length of judicial vacations, the conduct of the clerks' offices, the way in which records are to be kept and requirements relating to the keeping of statistical information and the form of reporting. The rules would undoubtedly provide for the adoption of supplemental local rules by the administrative divisions of the Superior Court and the District Court.

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[174] Quoted in AMERICAN BAR ASSOCIATION SECTION OF JUDICIAL ADMINISTRATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 52 (4th ed. 1961).

The Commission recommends that the office of sheriff not be included in a new state constitution as a constitutional office. Article IV, Section 44 of the present Constitution prescribes the duties of sheriff as those "fixed by law." Since these duties vary with the locality and often include law enforcement, it seems undesirable either to define the duties of sheriffs in a constitution or to require that such officers be solely within the State's judicial department. This draft section provides that officers who execute judicial orders, be they sheriffs, constables, or police officers, shall be subject to the rules of the Supreme Court to the extent that their duties relate to judicial orders. Whether sheriffs or similar officers are to be elected or appointed will be prescribed by law.

ARTICLE VI. STATE FINANCES

This draft article in draft Sections 6.01 and 6.02 deals with state debts and gifts and in draft Sections 6.03 to 6.10, inclusive, deals with budget and appropriations. Because the historical development of each of these two matters is quite different, there will be a separate introductory comment for each of the two groups of sections, followed by a section-by-section analysis and commentary as to each group of sections.

STATE DEBTS AND GIFTS

Introductory Comment:

The pertinent provisions of the present Constitution with respect to state debts and gifts are contained in Article III, Section 34 which imposes detailed restrictions on the creation of debt and the extension of credit by the State. The corresponding provision with respect to the creation of debt and the extension of credit by a county is contained in Article III, Section 54 of the present Constitution which requires the passage of an enabling act by the General Assembly before any county of the State may contract any debt or obligation in the construction of any railroad, canal or other work of internal improvement, or give or lend its credit to or in aid of any association or corporation. The pertinent provisions with respect to the creation of debt and extension of credit by Baltimore City are contained in Article XI, Section 7 of the present Constitution which requires the passage of an enabling act by the General Assembly, an ordinance by the City Council, the approval of the voters at a referendum and, in addition, imposes other restrictions similar to those imposed upon the State by Article III, Section 34.

With respect to the creation of debt and the extension of credit by the State, by Baltimore City and by any county of the State, the Commission is recommending provisions which are quite different from any of those contained in the present Constitution. In order to explain the reasons for these recommendations, it is necessary to review in some detail the history and present status of each of the provisions of the present Constitution mentioned above.

COUNTY DEBTS AND GIFTS

Draft Sections 6.01 and 6.02 of this draft article deal only with the creation of debt and extension of credit by the State and this article is not at all concerned with the creation of debt or extension of credit by Baltimore City or any of the counties of the State. However, it will be desirable to make a brief comment at this point as to the recommendation of the Commission with respect to constitutional limitations on the creation of debt and extension of credit by Baltimore City and the counties of the State.

Under draft Section 7.01, Baltimore City is to be considered for all purposes of the draft constitution as a county and draft Section 7.13 will therefore be applicable to Baltimore City and to each of the counties of the State. It will be noted that draft Section 7.13 deals only with a gift or loan of assets or credit of a county (including Baltimore City), a representative regional government or an intergovernmental authority; and with respect to a gift or loan of assets or credit of such units of local government, the provisions of draft Section 7.13 are closely analogous to the provisions of draft Section 6.02 dealing with a gift or loan of assets or credit of the State. However, there is no provision in the

draft constitution with respect to the creation of debt by a county (including Baltimore City), a representative regional government or an intergovernmental authority.

Under draft Section 7.05 powers are vested in a regional government either by the counties within the region, or by the General Assembly by law withdrawing specified powers from the counties within a region and conferring such powers upon the regional government, or by the General Assembly by law delegating powers of the State to the regional government. Under draft Section 7.06 powers may be conferred upon an intergovernmental authority either by the General Assembly or by a popularly elected representative local government such as a county or Baltimore City. Accordingly, a regional government or an intergovernmental authority would have the power under the draft constitution to create a debt or to make a gift or loan of its assets only if such power were conferred upon it in one of the manners stated, and the exercise of such power would, in addition, be subject to such limitations and restrictions as were placed upon it by the law conferring such power.

Under draft Section 7.07, however, a county may exercise any power other than judicial power not denied to it by the Constitution, by its charter or by public general law or which has not been transferred exclusively to another governmental unit. Accordingly, unless the power to do so is withdrawn from it in one of these manners or limited by public general law, a county (including the City of Baltimore) has unlimited power to create a debt and its power to make a gift or loan of its assets or credit to a private person or corporation is subject only to the limitations of draft Section 7.13.

This does not mean that the Commission recommends that the counties (including Baltimore City) be completely free of all restrictions whatsoever in the creation of debt and be subject only to the limitations of Section 7.13 in the gift or loan of assets or credit. What it does mean is that the Commission believes that such restrictions as are felt to be desirable should be imposed either by public general law enacted by the General Assembly or by the charter of a county or Baltimore City. If the restriction is one imposed by public general law, it would, of course, necessarily be applicable to all counties or to all counties of a class. If the restriction is imposed by charter, it would, of course, be applicable only to the county in whose charter the restriction was contained.

The Commission believes that these provisions will be sufficient to provide entirely adequate safeguards against the improvident creation of debt, or the making of improvident gifts or loans of assets or credit by any local governmental unit.

HISTORICAL DEVELOPMENT OF ARTICLE III, SECTION 34

The predecessors of Article III, Section 34 of the present Constitution were the product of public reaction against the nearly disastrous extent to which the General Assembly had loaned the credit of the State to rapidly expanding railroad and canal companies during the period of internal development and westward expansion in the United States from 1820 to 1850. Extraordinary appropriations were made by the General Assembly to such companies, notably the Chesapeake and Ohio Canal Company and the Baltimore and Ohio Railroad, generally by means of subscription to the securities of the companies in order to finance their construction programs.

Payment of the appropriations was often made by the transfer to the corporations of long-term state bonds, issued upon the faith and credit of the State. The corporations were entitled to sell the bonds; they did so, usually at substantial discounts, thus effectively raising needed expansion capital by pledging the credit of the State.

By 1840 almost fifteen million dollars in state debt had been incurred in order to make such appropriations. The bubble burst when many of the railroad and canal companies, particularly the Chesapeake and Ohio Canal Company, failed to produce the expected revenues to enable them to pay even the interest on the state bonds. The entire obligation was thrown upon the State which had not provided any funds for the purpose. An effort by the General Assembly to pay the State's debts by selling the State's interest in the railroad and canal companies was unsuccessful because purchasers for those investments could not be found. Finally, in 1846, the General Assembly saved the State's credit only by imposing additional real estate and personal property taxes to meet these overdue and accruing obligations.[175]

THE CONVENTION OF 1850

Article III, Section 22 of the Constitution of 1851 provided as follows:

> "No debt shall hereafter be contracted by the legislature, unless such debt shall be authorized by a law providing for the collection of an annual tax or taxes sufficient to pay the interest on such debt as it falls due, and also to discharge the principal thereof within fifteen years from the time of contracting the same, and the taxes laid for this purpose shall not be repealed or applied to any other object until the said debt and the interest thereon shall be fully discharged, and the amount of debts so contracted and remaining unpaid shall never exceed one hundred thousand dollars. The credit of the State shall not, in any manner, be given or loaned to or in aid of any individual, association, or corporation, nor shall the General Assembly have the power, in any mode, to involve the State in the construction of works of internal improvement, or in any enterprise which shall involve the faith or credit of the State, or make any appropriations therefor. And they shall not use or appropriate the proceeds of the internal-improvement companies, or of the State tax now levied, or which may hereafter be levied, to pay off the public debt, to any other purpose, until the interest and debt are fully paid, or the sinking fund shall be equal to the amount of the outstanding debt; but the legislature may, without laying a tax, borrow an amount, never to exceed fifty thousand dollars, to meet temporary deficiencies in the treasury, and may contract debts to any amount that may be necessary for the defence of the State."

Review of the debates of the Constitutional Convention of 1850 leaves no doubt that Section 22 was drawn in the wake of the State's acute financial embarrassment because of its wholesale extension of credit to the railroad and canal companies. The debates abound with references to the difficulty of marketing state bonds due to the depressed condition of the State's credit and with elaborate expressions of regret that extraordinary taxes had to be levied in order to meet the debt, with the result that the people of that era were being

[175] HANNA, A FINANCIAL HISTORY OF MARYLAND (1789-1848) 70-105 (1907).

heavily taxed to pay for the follies of the immediate past.[176]

Although there was virtual unanimity among the delegates as to the necessity for imposing some restrictions on the power of the General Assembly to contract public indebtedness, a substantial number of the delegates appear to have been opposed to an absolute bar against a loan of the State's credit to finance "works of internal improvement." A majority of the delegates, however, their attention fixed on the sorry experience of the State in aid of the railroad and canal companies, wrote into the Constitution the prohibitions against the extension of the State's credit to any individual, association or corporation, the involvement of the State in the construction of works of internal improvement and the granting of aid thereto which involved the faith or credit of the State.

THE CONVENTION OF 1867

Article III, Section 22 of the 1851 Constitution, unchanged in any significant respect, became Article III, Section 33 of the 1864 Constitution. The Constitutional Convention of 1867 added the following proviso to the prohibition against aiding "works of internal improvement":

> "[E]xcept in aid of the construction of works of internal improvements in the counties of St. Mary's, Charles and Calvert, which have had no direct advantage from such works, as have been heretofore aided by the State; and provided, that such aid, advances, or appropriation, shall not exceed in the aggregate the sum of five hundred thousand dollars."

This exemption appears to have been added in recognition of the fact that the various railroads and canals which had been the beneficiaries of substantial state aid during the 1830's and 1840's were not of direct benefit to the named Southern Maryland counties whose citizens had, nonetheless, been forced to bear their share of the tax burden necessary to pay off the state debt incurred because of such state aid. The exemption permitted such assistance in those counties to the dollar amount mentioned.[177]

SUBSEQUENT AMENDMENTS

In 1924 the General Assembly passed and the voters ratified the Veterans Bonus Amendment.[178] This amendment was designed to remove the prohibition felt to exist against pledging the credit of the State to raise money for a veterans' bonus. It was provided, however, that any bonus bill passed by the General Assembly would be subject to referendum.

In 1960 an amendment[179] struck from the section the $50,000 limit on borrowing for temporary deficiencies and replaced it with the present language permitting tax anticipation borrowing and enabling the state treasurer to borrow to meet temporary emergencies.

JUDICIAL INTERPRETATION

Beginning almost immediately after the adoption of the Constitution of

[176] See I Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution 338-57, 369, 375-79, 395, 411, 414-49, (1851); II Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution 339-47 (1851).

[177] See Perlman, Debates of the Maryland Constitutional Convention of 1867, 270, 279 (1923); Proceedings of the State Convention of Maryland to Frame A New Constitution 346 (1867).

[178] Acts of 1924, chapter 327, ratified Nov. 4, 1924.

[179] Acts of 1959, chapter 234, ratified Nov. 8, 1960.

1867, efforts were made to avoid what were regarded as the excessive limitations and restrictions of Article III, Section 34 and the companion provisions of Article III, Section 54 and Article XI, Section 7 of the Constitution. This resulted in litigation which was concerned principally with the meaning of three terms used in those constitutional provisions, namely, "debt," "credit," and "works of internal improvement." Space does not permit an exhaustive review of all the decisions of the Court of Appeals dealing with these three terms, but it is important here to deal briefly with the leading cases; not only to trace the growth and development of the case law dealing with these constitutional provisions, but to show the reasoning resorted to by the courts in an effort to avoid a literal interpretation of these provisions.

The leading case, and the one with which the inquiry must begin, is *Baltimore v. Gill*,[180] decided in 1869, in which the Court of Appeals was called upon to determine the meaning of "debt" in Article XI, Section 7, which in language closely paralleling that of Article III, Section 34, provided:

> "[N]o debt (except as hereinafter excepted), shall be created by the Mayor and City Council of Baltimore; nor shall the credit of the Mayor and City Council of Baltimore be given, or loaned to, or in aid of any individual, association, or corporation; nor shall the Mayor and City Council of Baltimore have the power to involve the City of Baltimore in the construction of works of internal improvement, nor in granting any aid thereto, which shall involve the faith and credit of the city, nor make any appropriation therefor, unless such debt or credit be authorized by [enumeration of requirements] . . . ."[181]

Baltimore City agreed to lend $1,000,000 to the Western Maryland Railway Company, believing that the City would thereby benefit. In order to avoid the constitutional restriction, an ordinance was passed authorizing the City to raise $1,000,000 by the pledge of capital stock of the Baltimore and Ohio Railroad which the City owned and to invest the money in mortgage bonds of the Western Maryland Railway Company. The ordinance further provided that the lender was to look exclusively to the pledge of Baltimore and Ohio Railroad stock and not to the general credit of the City for repayment of the loan.

This arrangement was attacked on the grounds that it constituted the creation of a "debt," the lending of the City's credit to a private corporation and involvement of the City "in the construction of works of internal improvement." In holding that the arrangement created a "debt" in the constitutional sense, notwithstanding the fact that the lender could look for repayment only to the Baltimore and Ohio Railroad stock and not to the City, the Court of Appeals held that the mere borrowing of the money by the City upon the pledge of a specific part of its property was sufficient to create a "debt" within the meaning of Article XI, Section 7. The Court said that the plain intent of Section 7 was "to restrain the municipal government of Baltimore from borrowing money, except for the purposes and in the manner prescribed, either upon the general credit of the City, or by a pledge of its revenues or assets; thereby creating a debt, and imposing additional

[180] 31 Md. 375 (1869).

[181] Baltimore v. Gill, 31 Md. 375, 386 (1869).

burdens upon the citizens, which may directly or indirectly involve increased taxation."[182]

When revenue bonds issued by states and municipalities to finance needed public improvements came into vogue in the early 1930's, it was thought that the decision in the *Gill* case might prevent the issuance of such revenue bonds in Maryland. Accordingly, the Maryland bridge program, involving the construction of the Susquehanna Bridge, the Potomac River Bridge and later the Chesapeake Bay Bridge, was delayed until a court suit could be instituted to determine whether revenue bonds could be issued without regard to Article III, Section 34. Such a test suit was instituted and the Court of Appeals held that no state "debt" in the constitutional sense was created by the issuance of such revenue bonds where both the authorizing statute and the bonds expressly provided that they would not constitute a "debt" or obligation of the State. The Court also held that the agreement by the State Roads Commission to maintain the bridges likewise did not create a "debt." The Court distinguished the *Gill* case by saying that in that case a "debt" existed because there was a pledge of existing property; whereas, in the bridge case there was no pledge of existing property, but a pledge of property that would come into existence only by virtue of the issuance of the revenue bonds.[183]

In the later case the Court upheld revenue bonds to provide financing for the reconstruction of Lexington Market in Baltimore City. Drawing an even finer distinction, the Court held that the Lexington Market revenue bonds were not to be secured by the market property, an existing property, but only by the revenues produced by the reconstructed market which had theretofore not been revenue producing because it had been operating at a loss.[184]

The term "credit" as used in these constitutional provisions has also required the drawing of fine distinctions by the courts. In an early case the Court of Appeals struck down an arrangement under which the County Commissioners of Anne Arundel County agreed to issue to a railroad negotiable county bonds in payment for a subscription to the stock of that railroad, and held that the arrangement was a loan of the county credit and that compliance with Article III, Section 54 of the Constitution was necessary.[185]

Sixty years later, sustaining the validity of a statute providing for the issuance of state bonds in the amount of $1,500,000, the net proceeds of which were to be given to the Johns Hopkins University for the construction of a new engineering building, the Court said:

> "Cash is not credit. Credit is sometimes a means of procuring cash, but the word is never used to describe a gift of cash. There is no prohibition in the Constitution against making appropriations to private institutions, provided the purpose is public, or semi-public, and thousands and thousand of dollars are appropriated out of the annual receipts every year. If the State should have a balance of a million and a half in its treasury from

[182] Baltimore v. Gill, 31 Md. 375, 390 (1869).

[183] Wyatt v. State Roads Commission, 175 Md. 258, 266 (1938).

[184] Castle Farms Dairy Stores v. Lexington Market Authority, 193 Md. 472, 483-84 (1949).

[185] Baltimore & Drum Point Railroad Company v. Pumphrey, 74 Md. 86 (1891).

annual receipts, there could be no constitutional objection to its giving this amount to the Johns Hopkins University for the purpose of constructing an engineering building. If the State does not have this amount available, but borrows it and then gives the cash to the University, which is what it is attempting to do, it is not giving or loaning its credit to, or in aid of, the University—it is using its credit with banking institutions to borrow the money, and it is giving the University its cash. What the Legislature of 1951 did by Chapter 414 was not to do by indirection what was forbidden to be done directly—it was to do something entirely different, something not prohibited, something not within the purpose of the constitutional prohibition, not within its wording, and not within its previous long-continued interpretation."[186]

The term "works of internal improvement" has also been the subject of much litigation. In an early case the Court of Appeals held that a state grant to counties for highway construction was not an involvement of the State "in the construction of works of internal improvement."[187] The Court in this case reviewed the historical background of these constitutional provisions at great length and concluded that railroads, canals and "possibly turnpikes," but not public roads, were the "works of internal improvement" which the constitutional provisions were intended to curb. The Court said that these works of internal improvement "were such as the State had been connected with or interested in as 'stockholder' or 'creditor'—such as had driven it to the very verge of bankruptcy and repudiation—and not such as every State government must have, either in its own name or in the names of its 'political agencies, created for the better government of the affairs of the State. . . .' "[188]

Other facilities which have been held by the Court of Appeals not to be "works of internal improvement" within the meaning of the constitutional prohibition are drainage and sewerage systems,[189] a public bridge,[190] a public market,[191] an educational institution,[192] a general hospital[193] and an international trade center.[194] In the last-mentioned case, in addition to a pledge of revenues to be derived from the project constructed with the bond proceeds, the Port Authority agreed to deposit monies from the general funds of a proposed trade center to assist in the construction of the center, and further agreed that the center itself was to be conveyed to a trustee as security for the payment of the principal and interest of the bonds.

In one of the latest cases, the Court approved the issuance of revenue bonds to finance construction of new state col-

[186] Johns Hopkins University v. Williams, 199 Md. 382, 401 (1952). See also Melvin v. Anne Arundel County, 199 Md. 402 (1952) in which the court upheld the issuance of Anne Arundel County bonds, the proceeds of which were to be given to a nonstock, nonprofit general hospital.

[187] Bonsal v. Yellott, 100 Md. 481 (1905).

[188] Bonsal v. Yellott, 100 Md. 481, 505 (1905).

[189] Welch v. Coglan, 126 Md. 1 (1915).

[190] Wyatt v. State Roads Commission, 175 Md. 258 (1938).

[191] Castle Farms Dairy Stores v. Lexington Market Authority, 193 Md. 472 (1949).

[192] Johns Hopkins University v. Williams, 199 Md. 382 (1952).

[193] Melvin v. Anne Arundel County, 199 Md. 402 (1952).

[194] Lerch v. Maryland Port Authority, 240 Md. 438 (1965).

lege dormitories when the bonds were secured in part by pledge of increased fees from existing college buildings.[195]

In 1965 an act of the General Assembly created the Maryland Industrial Development Financing Authority (MIDFA) and authorized it to insure mortgage loans secured by industrial projects.[196] The declared purpose of the act was to promote new and expanded industrial enterprises to provide greater opportunities for the gainful employment of people in Maryland. In a suit brought by a protesting taxpayer, the Court of Appeals held that a section of the Act purporting to pledge the full faith and credit of the State in support of the mortgage insurance was misleading because it was contrary to other provisions which limited the State's obligations as an insurer of the mortgages. The Court held that the statute must be construed so as not to pledge the full faith and credit of the State.[197]

In view of the fact that the purported pledge of the full faith and credit of the State was thought to be absolutely essential by the proponents of the statute, its effectiveness has been severely limited by the Court's construction. Because of this construction of the statute, the Court had no occasion to decide the important constitutional questions involved in the case. Its opinion, however, does make clear its awareness of the necessity of some restrictions on the extension of state credit if the State's bonds are to retain the "AAA" rating which they have had for many years.[198]

CONCLUSIONS

The Commission believes that Article III, Section 34 of the present Constitution should be entirely rewritten. The heart of this section, the provisions requiring each incurred debt to be accompanied by a specific tax exclusively devoted to debt service, limiting maturity to fifteen years and prohibiting extension of the State's credit to "any individual, association or corporation," was a response to a specific evil, the reckless commitment of the State's credit to the railroad and canal companies over one hundred years ago. The sweeping language of these prohibitions, read literally, would appear to preclude the State from engaging in such commonplace and essential forms of financing as long-term revenue bond financing, in which only funds derived from the financed project are pledged to service the "debt," or borrowing for the purpose of making grants to private educational institutions or hospitals. To be sure, as the analysis of the court cases indicates, these prohibitions have been construed by the courts against the background of their adoption and the judicial interpretation has generally permitted modern financing techniques—but not without a price. Frequent litigation has been essential and the words "debt," "credit," and "works of internal improvement," as used in this part of the Constitution, have taken on highly specialized meanings, understood only by the initiated. The words of the present Constitution, in short, do not mean what they appear to say.

[195] Lacher v. Board of Trustees of the State Colleges, 243 Md. 500 (1966). See also Waring v. Board of Trustees of St. Mary's College of Maryland, 243 Md. 513 (1966).

[196] ANNOTATED CODE OF MARYLAND article 41, sections 266J-266CC (1965 Replacement Volume).

[197] Maryland Industrial Development Financing Authority v. Meadow-Croft, 243 Md. 515 (1966).

[198] Maryland Industrial Development Financing Authority v. Meadow-Croft, 243 Md. 515 (1966).

The Commission has been extremely sensitive to the fact that the State today enjoys a "AAA" credit rating, the highest accorded to the bonds of any state or municipality. The Commission met with representatives of the leading banking and investment houses in Maryland and with a representative of Moody's Investors Service, Inc., the agency primarily responsible for rating the state bonds, in an effort to learn what effect, if any, changes in the Constitution would have on the State's credit rating. This basic inquiry was not directed to determining the soundness or unsoundness of particular uses of the State's credit, but was an effort to learn what effect, if any, changes in the State's organic law would have on its credit rating.

Although the views of the banking and investment witnesses were not always unanimous, there was general consensus on the following important points:

1. The State's credit rating will not suffer if the requirement that each loan be supported by a specific tax is abolished, so long as the full faith and credit of the State and the State's unlimited taxing power are permitted to stand behind its general obligation bonds.

2. Some constitutional limitation on the maturities of bond issues is essential in order to maintain the State's credit rating at present levels, but the constitutional limit on maturities can be extended from fifteen to twenty-five years without danger to the State's credit rating.

3. Revenue bond financing is necessary and desirable, and it should be made clear in the constitution that revenue bond financing is permissible.

4. Although constitutional provisions are relevant to a State's credit rating, the soundness of a State's management of its fiscal affairs in practice is of far greater importance.

RECOMMENDATIONS

The Commission believes that, so long as the full taxing power of the State stands behind its general obligation bonds, the elimination of the present requirement that each bond issue be accompanied by a specific tax for debt service will not affect the State's credit. Accordingly, the Commission recommends that this requirement be eliminated, and recommends that there be included, instead, a requirement that, when the General Assembly does not appropriate sufficient funds for the service of a particular debt, there shall be set apart from the first revenues thereafter received applicable to the general fund, a sum sufficient to service the debt. Such a provision has been recommended to the Commission by several of the banking and investment witnesses. It is similar to a provision which is in the present Constitution of New York.[199] The Commission believes that such a requirement will give the needed flexibility to the servicing of the state debt. In addition, an irrevocable pledge of the State's full faith and credit and unlimited taxing power will make clear the State's commitment to the payment and service of its debt.

The Commission further recommends that the provision be made that only general obligation bonds supported by a pledge of the State's full faith and credit and unlimited taxing power be considered a state indebtedness subject to constitutional restrictions.

The Commission also recommends that the maturity limit for general ob-

[199] New York Constitution article VII, section 16.

ligation bonds be established at twenty-five years. Most projects financed by bonds have useful lives of longer than fifteen years, and closer coordination between the useful life of the financed project and the life of the loan would promote greater and desirable flexibility in the establishment of the maturity schedules for the bonds in question. On the other hand, a maturity limitation in excess of twenty-five years might possibly adversely affect the State's credit rating and would be too great a shift to future generations of financial responsibility for the cost of today's progress.

The Commission further recommends that a "public purpose" test be the only constitutional limitation on the State's uses of its credit. Such a test rests on an accepted body of judicial opinion in Maryland, and the apparently inconsistent results of some of the court decisions can be explained by the fact that the courts have often applied a "public purpose" test to the financing arrangements being discussed.[200] This is not to say that every extension of credit heretofore undertaken with apparent legislative sanction would necessarily or automatically meet the "public purpose" test. The Commission seriously doubts, for instance, that every project which might be said to fall within the broad declared purposes of the MIDFA Act would, or should, be held to be a "public purpose."

The provisions of the present Constitution permitting limited appropriations for "works of internal improvement" in the three Southern Maryland counties no longer have relevance and should not be continued in a new constitution.

The Commission further recommends that a new constitution not contain any specific provisions relating to tax anticipation or bond anticipation borrowing, or provisions specifically permitting the contracting of debts for the defense of the State. If the "public purpose" test is adopted, the additional detailed provisions are unnecessary. The same may be said as to the specific authorization of a veterans' bonus.

Section 6.01. **State Indebtedness.**

The State shall have the power to incur indebtedness for any public purpose in the manner and upon the terms and conditions as the General Assembly may prescribe by law. All such indebtedness shall be secured by an irrevocable pledge of the full faith and credit and unlimited taxing power of the State. Unless the law authorizing the creation of an obligation includes such an irrevocable pledge, the obligation shall not be considered an indebtedness of the State. If at any time the General Assembly shall fail to appropriate sufficient funds to provide for the timely payment of the interest upon and installments of principal of all state indebtedness, there shall be set apart from the first revenues thereafter received applicable to the general funds of the State a sum sufficient to pay such interest and installments of principal. All state indebtedness shall mature within twenty-five years from the time when such indebtedness is incurred.

Comment:

This draft section embodies all of the Commission's recommendations with respect to state debt which are summarized at the end of the introductory comment to this draft article. It should be noted, however, that this draft section, unlike Article III, Section 34 of the

[200] Johns Hopkins University v. Williams, 199 Md. 382 (1952); Melvin v. Anne Arundel County, 199 Md. 402 (1952); Frostburg v. Jenkins, 215 Md. 9 (1957).

present Constitution, deals only with state indebtedness; it does not deal with a gift or loan of assets or credit of the State to a private person or corporation, which is dealt with in draft Section 6.02.

The first sentence of this draft section embodies the first principal recommendation of the Commission, namely, that the General Assembly shall have the power to authorize indebtedness on behalf of the State "for any public purpose." The Commission is fully mindful of the fact that "what is a public purpose for which public funds may be expended is not a matter of exact definition; it is almost entirely a matter of general acceptation."[201] It is true also that "the line of demarcation" between what is a private purpose and what is a public purpose "is not immutable or incapable of adjustment to changing social and economic conditions that are properly of public and governmental concern."[202]

This, however, is a desirable flexibility in the language of a constitution which ought to be able to meet the ever changing conditions of society. What, at any given point in time, would be generally accepted and understood as a "public purpose" should be deemed to be a "public purpose" within the meaning of this draft section. This is not to say that the General Assembly should be the sole or final arbiter as to what is or is not a "public purpose." In the final analysis, this decision is one for the courts; but it is not necessary or desirable that the term be rigidly defined to include only what may, under today's conditions and today's thinking, be regarded as a "public purpose."

The second and third sentences of this draft section embody the next principal recommendation of the Commission that the constitutional concept of a state debt be stated clearly and precisely. This purpose is accomplished by the requirement that a state debt be secured by an irrevocable pledge of the full faith and credit and unlimited taxing power of the State and the stipulation that without such an irrevocable pledge an obligation is not a state debt.

This provision does not, in any way, prohibit the issuance by the State, or any state agency, of revenue bonds secured not by a pledge of the full faith and credit of the State, but by the revenues of the project for the financing of which the revenue bonds are issued. Such revenue bonds are not affected by this draft section. This draft section in no way applies to such revenue bonds and in no way places upon the General Assembly any restriction whatsoever with respect to their issuance. This draft section makes it abundantly clear that such revenue bonds would not be a state indebtedness. Accordingly, the issuance of revenue bonds in the ordinary form will not affect the credit of the State. The credit of the State is pledged only with respect to state debt and, as this draft section makes very clear, state debt means only general obligation bonds of the State.

It should be emphasized, therefore, that neither this draft section nor any other provision of the draft constitution in any way limits or restricts the General Assembly in the authorization of revenue bonds to finance self-liquidating projects. The purchasers of revenue bonds will look solely to the revenues from the projects financed by such bonds for the repayment of the principal and interest of the bonds, and not to the State of Maryland.

[201] Finan v. Mayor and City Council of Cumberland, 154 Md. 563, 565 (1928).

[202] Frostburg v. Jenkins, 215 Md. 9, 16 (1957).

It should be noted also that there is no provision in this draft section or in draft Section 6.01 for the imposition of a special tax with which to fund a state debt. Here, again, a special tax would be unnecessary and, under the provisions of this draft section, would be improper since the full and unlimited taxing power of the State is pledged to repay every state indebtedness, and the repayment of a bond representing a state debt cannot be limited to funds derived from a special tax.

The fourth sentence of this draft section embodies the third principal recommendation of the Commission, and implements the requirements of the second and third sentences by providing a means by which any state indebtedness may be paid in the event the General Assembly should fail to appropriate sufficient funds to provide for the timely payment of interest and principal on state indebtedness when due. This sentence, in effect, makes the state debt a first charge upon the general funds of the State.

The fifth sentence of this draft section embodies the fourth principal recommendation of the Commission. It provides that no state indebtedness shall have a maturity longer than twenty-five years from the time such indebtedness is incurred.

The Commission believes that the requirements of this draft section will strengthen the credit standing of the State and will enable the State to maintain its present high rating. The simplicity and clarity of these provisions will also, it is hoped, bring to an end the almost continuous stream of litigation which has resulted from the elaborate provisions of the present Constitution in the one hundred years of their existence.

Section 6.02. **Gift or Loan of Assets or Credit.**

The assets or credit of the State shall not in any manner be given or loaned to any individual, association, or corporation unless a public purpose will be served thereby and unless authorized by an act of the General Assembly stating the public purpose and, in the case of a gift or loan of credit or a loan of assets, passed by the affirmative vote of three-fifths of all the members of each house.

Comment:

This draft section deals not with state indebtedness, but with a gift or loan of assets or credit of the State. It should be noted, however, that the first clause embodies the same "public purpose" concept of draft Section 6.01 dealing with state debt in that a gift or loan of assets or credit of the State to any private person is prohibited unless a public purpose will be served thereby.

This draft section differs significantly from the provisions of the present Constitution which flatly prohibit a gift or loan of the credit of the State to a private person. In this draft section a gift or loan of credit, or loan of assets, is not prohibited, but may be made only by a law enacted by the affirmative vote of three-fifths of all the members of each house of the General Assembly.

In addition, it will be noted that the statute must state the public purpose to be served by the gift or loan of assets or credit. The Commission believes this requirement to be a salutary provision. The General Assembly should be required to state clearly in the statute the public purpose which it believes will be served by the gift or loan of the assets or credit of the State.

Such a statement will serve several purposes. First, it will state the issue clearly for the members of the General Assembly so that in the consideration of the legislation there will be no uncertainty as to the real purpose of the statute. Second, it will inform the public of the public purpose intended to be served by the statute. Third, it will state for the consideration of the courts what the General Assembly believes to be the public purpose for which the legislation is designed since, as pointed out in the comment to draft Section 6.01, it will be the courts which, in the final analysis, will determine whether a "public purpose" is being served.

It should be noted that a gift of assets may be authorized by a statute which is not passed by the affirmative vote of three-fifths of all the members of each house. Gifts of assets for a public purpose, as for instance, gifts of cash to private educational institutions performing public functions, have been well recognized as entirely proper and, indeed, in many instances necessary.[203] The gift of assets for a public purpose is a practice long followed in this State, and there is no necessity to require that the authorizing statute be passed by a three-fifths vote. A gift or loan of credit or a loan of assets is, however, in a different category. It is unlike an immediate gift of assets in that it creates no present problem; it is something for the future and, hence, something that may never exist as a problem. It is, therefore, an action as to which there can be irresponsibility because of the ease with which one may be lulled into a sense of false security.

The Commission is fully mindful of the very strong arguments which can be made for a complete prohibition of a gift or loan of credit, or a loan of assets; but, as pointed out in the introductory comment, the reasons given for the inclusion of such a prohibition in the Constitution adopted more than one hundred years ago no longer exist. The Commission believes that the provision requiring the affirmative vote of three-fifths of all the members of each house to approve a gift or loan of credit, or a loan of assets, will afford sufficient protection against unwise or improvident action by the General Assembly.

BUDGET AND APPROPRIATIONS

Introductory Comment:

For more than fifty years the State of Maryland has operated under the executive budget system, the provisions of which are presently embodied in the fifteen subsections of Article III, Section 52 of the present Constitution. All provisions of the draft constitution dealing with budget and appropriations are contained in this draft article and embodied in draft Sections 6.03 to 6.10, inclusive. The Commission recommends that the executive budget system be retained in a new constitution, but it also recommends that the present very detailed provisions of Article III, Section 52 be completely rewritten so as not only to eliminate much of the detail which should not be in a constitution, but also to state the controlling principles more clearly and simply. Before the draft sections which are recommended to accomplish this purpose are discussed in detail, a brief historical review will be helpful.[204]

[203] Johns Hopkins University v. Williams, 199 Md. 382, 401 (1952).

[204] In its consideration of the budget provisions of the present Constitution, the Com-

HISTORICAL REVIEW

The State of Maryland adopted the executive budget system in 1916. It was the first state to do so.[205] Previously, in common with her sister states, Maryland had no orderly system of planned public expenditures. The practice prior to 1916 was for the governor, pursuant to the command of Article II, Section 19 of the present Constitution, to appear before a joint session of the two houses of the General Assembly and address them on the "conditions of the State," in the course of which address he directed attention to the State's needs, and recommended measures which, in his judgment, were required to meet them. The governor possessed the power under Article II, Section 17 to veto items in appropriation bills, but political realities dictated that he exercise this veto sparingly. Furthermore, vetoed items could be passed over the governor's veto.

In short, the General Assembly, under the practice existing prior to 1916, exercised the effective power to set the fiscal policies of the State. Under this system, "appropriations for various purposes were made piece-meal by the General Assembly, each project receiving independent consideration without relation to other claims upon the public purse."[206] Whatever may have been the practical possibilities, in an earlier day, for state legislators to have a total picture of the State's fiscal operations, by 1916 the growth of the state government had made it impossible. Consequently, expenditures were made in a haphazard fashion and "logrolling" for pet projects of various legislators was common, with the result that embarrassing deficits in the state treasury occurred. In 1915 alone, the treasury showed a deficit of $2,000,000. Furthermore, important state activities and needs were overlooked.[207]

The acute need for centralized budget administration became recognized. Shortly after his inauguration in 1916, Governor Emerson C. Harrington transmitted to the General Assembly a report on a budget system by the Commission on Economy and Efficiency, headed by Dr. Frank J. Goodnow, President of the Johns Hopkins University. This report contained a proposed constitutional amendment, the purposes of which were summarized in the report as follows:

> "1st. To impose upon the Governor the sole responsibility, within the limits of the Constitution and the provisions of existing law, of presenting to the Legislature a complete and comprehensive statement of the needs and resources of the State, based upon:
>
> a. Estimates made by those applying for State moneys.

mission heard testimony from Messrs. James G. Rennie, then Director, and James P. Slicher, present Director of the Department of Budget and Procurement of the State of Maryland; Mr. Charles L. Benton, Director of Finance, Baltimore City; Mrs. Janet L. Hoffman, Fiscal Advisor to the City Council of Baltimore; Mr. John G. Lauber, then Director of Finance, Montgomery County, and now Administrative Assistant to the Governor for fiscal matters; Mr. John A. Donaho, President of John A. Donaho and Associates, Inc., consultants to governments; numerous representatives of the Maryland State Department of Education, including Dr. James A. Sensenbaugh, State Superintendent of Schools; and Mr. Milson C. Raver, Executive Secretary of the Maryland State Teachers Association.

[205] FIRST INTERIM REPORT OF THE [MARYLAND] COMMISSION ON ADMINISTRATIVE ORGANIZATION OF THE STATE, THE MARYLAND BUDGET SYSTEM (1951).

[206] McKeldin v. Steedman, 203 Md. 89, 96 (1953).

[207] See MILES, THE MARYLAND EXECUTIVE BUDGET SYSTEM 8-9 (1942).

b. Evidence brought out at public hearings on those estimates.

c. Administrative revision by the governor of all estimates, except those for the Legislature and the Judiciary, and for purposes for which provision has been made by the Constitution or existing law.

"2nd. To make it impossible for the Legislature so to change the plans proposed by the Governor as to produce a deficit.

"3rd. To permit the Legislature to make provision for any purpose not included in the Governor's plan, on the condition that it provide also for the revenue, which the accomplishment of its purpose necessitates."[208]

The proposed amendment was ratified by the people in 1916 and forms the heart of Article III, Section 52 of the present Constitution.[209] The central purpose of the "budget amendment" was to impose upon the governor the primary responsibility for controlling the fiscal policies and operations of the State and on the General Assembly the secondary task of reviewing the governor's proposals and eliminating unnecessary or excessive items. The General Assembly was allowed the initiative in passing supplemental appropriation bills only after the governor's budget had been acted upon and on condition that each supplemental appropriation bill be limited to a single purpose and impose a tax to produce revenue sufficient to pay the appropriation.

For the most part the executive budget system has served its major purpose, that of preventing deficits. It failed to do so only for a brief period during the Depression.[210] Nevertheless, the continued rapid growth in the State's activities prompted new criticism of the budget system. The First Interim Report in 1951 of the Commission on Administrative Organization of the State (the Sobeloff Commission) recommended numerous administrative changes and pointed to two major defects in the constitutional provisions.

That Commission found that the mass of itemized detail submitted to the General Assembly made it virtually impossible for conscientious legislators to grasp the significance of the expenditures they were called upon to analyze on short notice. Accordingly, that Commission recommended discontinuance of the "line item" budget and its replacement by a "program budget" in which expenditures are grouped by services to be performed so that legislators could more easily establish the relationship between a state service and its cost.[211]

That Commission also found that the power granted to the governor by Article III, Section 52(5) of the present Constitution to amend or supplement the budget prior to final passage "to correct an oversight, provide funds contingent on pending legislation or, in case of an emergency" had in practice been abused. Its report said:

"Knowing that frequently a Governor can be persuaded to include items in a supplemental budget which

[208] First Interim Report of the [Maryland] Commission on Administrative Organization of the State, The Maryland Budget System 3 (1951).

[209] Acts of 1916, chapter 159, ratified Nov. 7, 1916.

[210] See Miles, The Maryland Executive Budget System 8-9 (1942).

[211] First Interim Report of the [Maryland] Commission on Administrative Organization of the State, The Maryland Budget System 14-24 (1951).

have not been subjected to careful scrutiny by the Budget Director, petitioners for funds may deliberately neglect to make requests in time for inclusion in the initial budget. Furthermore, the Commission has been advised that the supplemental budget has become a bargaining device between the legislature and the executive. It is said that legislators will at times make approval of proposals sponsored by the Governor contingent on his inclusion of items sponsored by them in the supplemental budget. This means that financial and administrative problems get shunted into an area of political controversy for decision without regard to financial soundness. We are convinced that, with adequate advance notice, the Governor can enforce presentation of all budget requests in time for inclusion in his original budget. In the interest of sound budgeting, we urge that he do so. The power will remain, as now, to use the supplemental budget device to correct mechanical errors and to provide for expenditures required by legislation enacted at the current session prior to enactment of the budget."[212]

Response to the first of the proposals by the Commission on Administrative Organization of the State with respect to the constitutional provisions was swift. In 1952 the voters adopted amendments to subsections (4) and (5) of Article III, Section 52 of the present Constitution which eliminated the requirement that the budget contain an "itemized" estimate of appropriations, and instead required only that the estimate of all appropriations and the budget bill be "in such form and detail as the governor shall determine or as may be prescribed by law."[213] Since the adoption of these amendments, a budget by programs has been employed in Maryland.

No changes in the present Constitution have resulted from the second finding mentioned above of the Commission on Administrative Organization of the State, namely, the abuse of the governor's power to amend and supplement the budget. This Commission, however, in this draft article has attempted to provide a safeguard against this abuse.

JUDICIAL INTERPRETATION

In 1953 the General Assembly authorized a bond issue and provided for the levy of a special tax sufficient to discharge the interest on the bonds as it became payable and the principal of the bonds within fifteen years in accordance with the requirements of Article III, Section 34 of the present Constitution. Another section of the "bond act" provided that the governor should include in his annual budget an item for the payment of principal and interest due on the bonds in each respective year; and further provided that the special tax should not be levied unless the general funds appropriated in the annual budget bill were insufficient to discharge the obligations created by the "bond act." The Court of Appeals held that this arrangement was contrary to the purposes of Article III, Section 52 of the present Constitution and, hence, invalid. The Court declared that the purpose of Article III, Section 52 was not only to prevent the General Assembly from so changing the plans of the governor as to

[212] First Interim Report of the [Maryland] Commission on Administrative Organization of the State, The Maryland Budget System 24-25 (1951).

[213] Acts of 1952, chapter 20, ratified Nov. 4, 1952.

produce a deficit, but also to prevent the General Assembly from reaping the political benefit of authorizing expenditures while imposing upon the governor the distasteful burden of imposing the tax required to pay the cost.[214]

In 1939 the General Assembly created the Commission of Fisheries to be supported by certain designated revenues. An attempt was made to petition the law to referendum and this was resisted in the courts. The narrow question before the court was whether the act which established the Commission constituted a "law making an appropriation." If so, the law could not be submitted to referendum because laws making an appropriation for the maintenance of the government are not subject to referendum. The Court of Appeals held that the law did not make an appropriation merely because it required certain expenditures which, however, could be disbursed from the treasury only by an appropriation.[215]

There is some inconsistency between the principles enunciated in these two cases. In the one case the Court held that the budget amendment prevents the General Assembly from making an appropriation without shouldering the responsibility for imposing the tax necessary to pay it. In the other case, the Court held that the General Assembly may by general law provide that certain sums are to be expended for a particular purpose and thereby make it incumbent upon the governor to provide in his budget an appropriation to pay the cost.

In another case which should be noted, the Court of Appeals held that a supplementary appropriation bill may be "considered," but may not be put to a vote in either house of the General Assembly before final action is taken on the budget bill. The Court said that the purpose of Article III, Section 52(8) of the present Constitution was to prevent a vote on another appropriation bill before final action on the budget bill.[216]

RECOMMENDATIONS

The Commission firmly believes that provisions establishing the structure of the State's budget system should be continued in a new constitution. In large measure, the practical relationship between the executive and legislative branches of the state government is determined by the constitutional rights and duties of each branch with respect to the state budget. The Commission's inquiry into the concept and operation of the present executive budget system has convinced it that the system is fundamentally sound, both in theory and practice. The Commission's recommendations are designated primarily to improve the system's operation along lines already charted by the "Goodnow" and "Sobeloff" commissions, while removing unnecessary detail from the constitution.

Section 6.03. **Appropriations.**

The General Assembly may not appropriate any money out of the treasury except by a budget bill or a supplementary appropriation bill.

Comment:

The simple, yet emphatic sentence which constitutes this draft section is the keystone of the budget system. The General Assembly may by law set up programs, create agencies and authorize expenditures for their maintenance, but no money for such expenditures can

[214] McKeldin v. Steedman, 203 Md. 89 (1953).

[215] Dorsey v. Petrott, 178 Md. 230 (1940).

[216] Bickel v. Nice, 173 Md. 1 (1937).

be paid out of the state treasury unless, in addition to the law authorizing the expenditures, there is an appropriation either by budget bill or supplementary appropriation bill. Every appropriation of money out of the state treasury must, therefore, be made pursuant to the provisions of draft Sections 6.03 to 6.10, inclusive. There is no other authority anywhere in the draft constitution for the expenditure of public monies by the General Assembly or any other branch of the government.

This draft section is essentially the same in substance as Article III, Sections 52(1) and 52(2) of the present Constitution.

Section 6.04. **The Budget.**

On the third Wednesday in January in each year (except in the case of a newly elected governor, and then not later than twelve days after the convening of the General Assembly into regular session), unless such time be extended by the General Assembly, the governor shall submit to the General Assembly a budget for the ensuing fiscal year. The budget shall show the estimated surplus or deficit of revenues at the end of the preceding year and shall contain, for the fiscal year covered thereby, an estimate of revenues, a complete plan of proposed expenditures by program including all appropriations required by this Constitution or by law, and any additional information prescribed by law, all in such form and detail as the governor shall determine. The total of the proposed expenditures shall be limited to funds available therefor as shown in the budget.

Comment:

In broad outline and general concept this draft section is essentially the same as Article III, Section 52(3) of the present Constitution, but a number of important changes in detail have been made.

The present Constitution provides that on the third Wednesday in January of each year, except in the case of a newly elected governor and then not later than ten days after the convening of the General Assembly, the governor shall submit his budget. The third Wednesday in January is the date set for the convening of the General Assembly and, accordingly, the ten-day period applicable in the case of a newly elected governor expires on a Saturday. This draft section changes the ten-day period to a twelve-day period so that it will expire on a Monday instead of a Saturday, thus allowing the newly elected governor an extra weekend in which to put his budget message into final form.

The Constitutional Convention will undoubtedly consider recommendations for a different date for the convening of the General Assembly and a different date for the inauguration of a newly elected governor.[217] In the event the times for the convening of the General Assembly and for the inauguration of a newly elected governor are changed, the provisions of this draft section should be changed accordingly.

The second sentence of this draft section contains the basic requirements now included in Section 52(3), but the effort has been made to state these requirements more simply, directly and clearly. The words "by program" have been inserted after the words "a complete plan of proposed expenditures" in order to implement further the recommendation for a "program budget" contained in the Report of the Commission on

[217] See comment to draft Sections 3.12 and 4.05.

Administrative Organization of the State referred to in the introductory comment, and the 1952 amendments to Article III, Sections 52(4) and 52(5) which were enacted pursuant to the recommendation in that Report, and eliminated the line-item requirement which had theretofore existed. The recommendation embraced in this draft section carries this important concept one step further and makes it clear that the budget itself, as well as the budget bill, is to be constructed by "programs."

It should also be noted that although the governor, under the language of the second sentence of this draft section, has the primary duty to determine the form and detail of the budget, nevertheless, the General Assembly may by law require that specified information be included in the budget. This provision is essential to ensure the members of the General Assembly the power to require that they be fully informed concerning all matters contained in the budget or necessary to an understanding of the budget. The second sentence of this draft section, in addition, requires that the budget include all appropriations required by this constitution or by law. Further comment with respect to this requirement will be found in the comment to draft Section 6.05 which deals with mandatory appropriations.

The last sentence of this draft section is the imperative one which requires that the budget be "balanced." There is no explicit requirement to this effect in Article III, Section 52 of the present Constitution, although the provisions of that section might be read and have been interpreted to require the submission of a balanced budget. Inasmuch as the concept of a balanced budget lies at the very heart of the executive budget system, the Commission believes that it should be explicitly stated in the constitution. It was thought at first that the use of the word "balanced" alone might suffice for this purpose; but upon further consideration, the Commission believes that the simple, clear and explicit declaration of the last sentence of this draft section is the more desirable.

Section 6.05. **Mandatory Appropriations.**

The estimates of appropriations for the legislative branch, certified by the presiding officer of each house, and for the judicial branch, certified by the chief judge of the Superior Court, shall be transmitted to the governor, in such form and at such time as he shall direct. To the extent that appropriations for the legislative and judicial branches and for state support of public school systems are required by law, the estimates therefor shall be included in the budget without revision.

Comment:

This draft section is intended to continue the substance of the provisions of Article III, Section 52(4) of the present Constitution and a part of the provisions of Article III, Section 52(11), but the effort has been made to state the requirements as to mandatory appropriations in simpler and clearer language. This draft section enlarges the powers of the General Assembly in initiating items for the budget and, thereby, to some extent restricts the powers of the governor in the initiation and preparation of the budget.

The preparation of the budget is entirely in the hands of the governor except with respect to the appropriations for the legislative and judicial branches of the government. The budget for the legislative branch is prepared by the presiding officer of each house of the

General Assembly and is certified to the governor. There is no other explicit provision in the draft constitution for the preparation of the budget for the legislative branch and, hence, this will be done in such manner as is prescribed by law or by the rules of the two houses of the General Assembly.

The budget for the judicial branch is to be certified to the governor by the chief judge of the Superior Court, who, under draft Section 5.27, is the chief administrative judge of the judicial system. Here again, there is no other explicit provision elsewhere in the draft constitution as to the preparation of the budget of the judicial branch; so this will be done in such manner as may be prescribed by law or by rule of the Supreme Court.

The limited control of the General Assembly and the corresponding restriction on the power of the governor in the initiation of the budget are contained in the second sentence of this draft section. This provision requires the governor to include in the budget without revision the appropriations for the legislative and judicial branches and for state support of public school systems to the extent, but only to the extent, that the appropriations for the legislative and judicial branches and for state support of public school systems are required by law. This gives the General Assembly complete control over the budget of the legislative branch because it can by law provide what appropriations must be made.

Similarly, the General Assembly, except as limited by other constitutional provisions such as the prohibition against reduction in judges' salaries during their terms of office, has control, or at least theoretical control, over the budget of the judicial branch. In practice, however, this will be a control exercised jointly by the governor and the General Assembly, because the governor is required to include in the budget only those appropriations for the judicial branch which are required by law, and it is unlikely that the General Assembly will by law provide for all the expenditures included in the annual budget for the judicial branch. In any event, these two provisions preserve a measure of independence of the legislative and judicial branches from the executive branch. The "power of the purse" initially is largely vested in the governor but as to the legislative and judicial branches it is restricted.

The situation as to the public school system is somewhat different and because the Department of Education and the Maryland State Teachers' Association were very concerned about the provisions in the present Constitution with respect to the budget of the Department of Education, the Commission made a special study of the background and operation of the provisions of the present Constitution dealing with this matter.

It should be made clear at the outset that the protection accorded the "estimates for . . . the public schools as provided by law" under Article III, Section 52(11) of the present Constitution has never been construed to encompass the entire budget of the State Department of Education. To the contrary, the protection has been limited to "those estimates the amount of which is made mandatory by law"; that is, those estimates made pursuant to the laws of Maryland pertaining to education which require "fixed or mathematically calculable expenditures by the State for the public school system."[218] As the attorney general has pointed out:

[218] 36 Ops. Atty. Gen. 109, 110-11 (1951).

"To hold that the Department of Education has uncontrolled power over all appropriations for the public school system would give that Department indirect control over the entire State budget. Yet the Governor and the General Assembly are by Section 52 of Article III of the Constitution charged with responsibility for the over-all fiscal program of the State."[219]

In the view of the attorney general in 1951, budget estimates for the following items fell into the so-called "mandatory" category and could not be revised downward by the governor or by the General Assembly: Teachers' Retirement System, exclusive of the Administration Expense Fund; aid per classroom unit; basic aid per pupil; Equalization Fund; part payment of salaries of school officials; incentive fund for buildings; education of physically and mentally handicapped children; and state aid to public libraries.

The attorney general pointed out, however, that "the facts upon which the estimates are based must be correct, and we think the Department of Education ought to be compelled to show their accuracy."[220]

In 1964 the General Assembly made the first major revision in the basic state aid to education program since 1921,[221] significantly altering the statutory formula under which state aid to education is calculated. The basic purposes of the revision were to raise the level of the State's commitment to public education and to reduce disparities in the educational systems among the counties. The primary features of the revised formula are (1) the guarantee to every child in the State of an expenditure of $340 for current expense costs, (2) a required local share for each county and Baltimore City in an amount equal to 1.228 per cent of the sum of its "adjusted assessed valuation of real property" and its total "net taxable ordinary income," and (3) a guaranteed minimum state contribution for each pupil of $98.[222] The revision does not appear to have significantly affected the so-called "mandatory items" not subject to budget revision by the governor or the General Assembly. In testimony before the Commission the State Superintendent of Schools cited the following budget items as "mandated": state share of current expense; current expense incentive aid; pupil transportation; incentive fund for school construction; aid for handicapped children; junior colleges; public libraries; public library incentive aid; and Teachers' Retirement System. Although open to some differences in interpretation, these categories appear to reflect the attorney general's standard; that is, estimates for state aid which require fixed or mathematically calculable expenditures by the State for the public school system.

The "mandated items" for public schools fall into what may be termed, broadly speaking, expenditures for "operations"—expenses such as teachers' salaries, classroom construction, textbooks, heat and light for school buildings, and transportation—as opposed to expenditures for "administration." It has apparently never been suggested, for

[219] 36 Ops. Atty. Gen. 109, 111 (1951).

[220] 36 Ops. Atty. Gen. 109, 112 (1951).

[221] Acts of 1964, chapter 17.

[222] Other important details of the rather elaborate structure of the state aid formula are set out and explained in FINANCING EDUCATION FOR OUR TIMES IN MARYLAND, a pamphlet published by the Maryland State Department of Education in May, 1964.

example, that the salary of the state superintendent of schools or other items relating to the internal administration of the Department of Education are "mandated" items.

Under the attorney general's ruling cited above, the General Assembly effectively controls the practical meaning of the protections to the Department of Education budget presently afforded by subsections (11) and (12) of Article III, Section 52. The General Assembly not only determines the quantity of state aid, but, by controlling the question of whether to require state aid for given budgetary items by a "fixed or mathematically calculable expenditure," completely determines what shall or shall not be a "mandated" item. Thus even the protections presently afforded to mandated items by subsections (11) and (12) of Section 52 would appear to be sharply limited, in theory at least, by the will of the General Assembly.

Representatives of the State Department of Education and of the Maryland State Teachers' Association strongly urged retention of the existing provision as a guarantee against "political" interference with the school budget. The State Superintendent of Schools told the Commission that in other states, where revisions of the education budget are permitted, the education budget does become embroiled in "politics." The Executive Secretary of the Maryland State Teachers' Association said that the present provision is "the primary protection which keeps public schools out of politics" and is even more important than the protection against legislative revision which presently appears in Article III, Section 52(6) and which the Commission recommends be retained in draft Section 6.07.

Representatives of the Department of Budget and Procurement and some outside consultants suggested, with varying degrees of intensity, that the provision be eliminated because it undercuts the governor's control of his own budget and, thus, runs counter to the philosophy of the executive budget system. The present director of the Department of Budget and Procurement pointed out that, traditionally, the Department of Education was the largest "reverter"— *i.e.,* returned the largest percentage of unspent funds to the treasury—and suggested that this was due in large part to the inability of the budget department to revise education department estimates on the same basis as it revises the estimates of other state agencies.

Much testimony revolved around the extent to which the prohibition against a reduction by the governor of "mandated" items has practical meaning. Initially, there appeared to be significant conflict in the testimony on the question of whether the Department of Budget and Procurement did, in fact, revise some of the estimates, even as to "mandated" items, on which the education budget is based, particularly the estimate as to the anticipated number of pupils for the budgeted school year. The conflict has been seemingly reconciled, however. The true state of affairs would appear to be that the budget department does not hesitate to check those budget items which are based upon estimates by the Department of Education, and the Department of Education does not hesitate to correct erroneous estimates pointed out by the budget department analysts. In short, a cooperative atmosphere appears to prevail in which genuine give-and-take occurs. There has been no occasion brought to the atten-

tion of the Commission on which the Department of Education had to insist on the protections of subsections (11) and (12) of Section 52. Education officials testified, however, that the very presence of the protection was in part responsible for the atmosphere of give-and-take in discussions between the budget and education departments.

Conclusions

There was no clear evidence to indicate that the relative freedom of the Department of Education from "political" interference is due to the protections of subsections (11) and (12) of Section 52. A report cited to the Commission by the Executive Secretary of the Maryland State Teachers' Association[223] contains a strong indictment of political interference in the Maryland school system and recommendations for reform, many of which were incorporated into the extensive reforms of Maryland's system of education which were enacted by the General Assembly in 1916. The report does not, however, make reference to the provisions here in question. The Commission believes that the evil of "political" interference, from a budgetary standpoint, to which sound objection was made in the above-mentioned report, was that of "logrolling" for pet educational projects by the General Assembly.[224] It should be remembered that legislative "logrolling" on a more widespread scale was one of the factors which led to the adoption of the executive budget system in 1916.

In short, there does not appear to be evidence of "political" manipulation of the education budget by the governor. Prior to the 1916 budget amendment, Maryland had no executive budget system and the governor had no effective control of the budget and the protections of subsections (11) and (12) of Section 52 have been in effect since the adoption of the executive budget system. Accordingly, Maryland is without experience which would indicate whether the feared evils of "political" manipulation by the governor would or would not occur if these provisions were not retained.

Despite the absence of clear evidence that the provisions in question are responsible for the absence of "politics" in the public school system, the Commission recognizes that the protection to the education budget has become an important symbol of the freedom of the public schools from "politics." Since these provisions make only a limited inroad into the governor's control of his budget, the Commission believes that, on balance, the substance of the present protection ought to remain in a new constitution.

The Commission believes, however, that the language of the protection ought more nearly to conform to present practice and to reflect the fact that only items mandated by the General Assembly are protected. Thus, the Commission has substituted the words "as *required* by law" for the words "as *provided* by law" and has substituted the words "estimates . . . for state support to local school systems" for the words "estimates . . . for the public schools." The Commission believes that the proposed substitutions more clearly reflect the nature of those items which have traditionally been "mandated," yet the language is flexible enough to encompass periodic adjustments in the state aid formula by the General Assembly.

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[223] Flexner & Bachman, Public Education in Maryland—A Report to the Maryland Educational Survey Commission (5th ed. 1921).

[224] See Flexner & Bachman, Public Education in Maryland—A Report to the Maryland Educational Survey Commission, chapters 9 and 12 (5th ed. 1921).

Section 6.06. **Presentation of Budget Bill.**

The governor shall deliver to the presiding officer of each house the budget and a bill for all the proposed appropriations of the budget, classified and in such form and detail as he shall determine or as may be prescribed by law. The presiding officer of each house shall promptly cause the bill, called the budget bill, to be introduced. The governor may, before final action thereon by the General Assembly, amend or supplement the budget bill to correct an oversight, to appropriate funds contingent on passage of pending legislation or to provide for an emergency. Such amendment or supplement shall be delivered to the presiding officers of both houses, and it shall thereafter become a part of the budget bill as an addition, substitute or modification thereof or any item thereof. Each amendment shall be accompanied by a statement by the governor explaining the reasons therefor.

Comment:

The first two sentences of this draft section are in substance the same as the provisions now incorporated in the first sentence of Article III, Section 52(5) of the present Constitution. The third sentence of this draft section is substantially the same as the first clause of the second sentence of the present Section 52(5), with the exception that this draft section elimates the requirement of Section 52(5) that the governor can amend or supplement the budget bill only "with the consent of the General Assembly." The Commission believes that such a consent requirement is inconsistent with the executive budget system in which Maryland has pioneered, and undercuts the governor's primary responsibility for the budget. This was also the view of the numerous governmental budget experts who testified before the Commission.

The fourth sentence of this draft section is substantially the same as the last clause of the second sentence of Article III, Section 52(5).

The fifth sentence of this draft section is an innovation and is recommended by the Commission as the safeguard against abuse of the governor's power to amend or supplement the budget. The Commission believes that if the governor is required to explain publicly each proposed budget bill amendment, the danger of his attempting to amend the budget in such a way as to bear no relation to the original document, or of his attempting to make substantive changes on the grounds of "oversight," will be substantially lessened. The Commission is informed that the present practice is for the governor to explain proposed budget bill amendments, but it believes that the recommended provision will ensure that the practice continues. The Commission further believes that this safeguard will meet one of the criticisms of the present system pointed out by the Commission on Administrative Organization of the State and discussed in the introductory comment.

Section 6.07. **Amendment of Budget Bill.**

The General Assembly may amend the budget bill by increasing any item relating to the legislative or judicial branches, or by reducing or striking out any item except the appropriation of sufficient funds to provide for the timely payment of the interest upon and installments of principal of all state indebtedness and the appropriations required by law for state support of public school systems; but it

may not otherwise amend the budget bill or change the estimate of revenues. The compensation of a public officer may not be decreased during his term of office.

Comment:

Article III, Section 52(6) of the present Constitution provides that the General Assembly shall not amend the budget bill in such a way as to affect the debt service obligations under Article III, Section 34 of the present Constitution, the provisions made by law for the establishment and maintenance of a system of public schools, or the payment of any salaries established by the Constitution. The first sentence of this draft section continues the prohibition against legislative amendment of the budget bill so as to affect debt service obligations, but does so in language consistent with draft Section 6.01.[225]

The first sentence of this draft section also continues the prohibition against legislative amendment so as to affect the provisions made by law for the establishment and maintenance of a system of public schools. This is a corollary of the complementary provision of draft Section 6.05, necessary to protect the public school system. This whole question is discussed at length in the comment to draft Section 6.05.

The first sentence of this draft section omits the prohibition in the present Constitution against legislative amendment of the budget bill so as to affect salaries required to be paid by the Constitution. The Commission recommends the omission of this provision on the assumption that the new constitution will not provide for specific salaries.

The first sentence of this draft section also includes a new prohibition against bill; namely, a prohibition against legislative amendment of the budget amendment so as to affect the estimate of revenues contained in the budget bill. Each of the experts who testified before the Commission emphasized the absolute necessity of preventing the General Assembly from tampering with the revenue estimates upon which the governor's budget is predicated. The Commission believes that such a prohibition is vital to the operation of an executive budget system. It has been informed by the state budget director that, in his long experience, the General Assembly has never amended the revenue estimates, although unsuccessful attempts to do so have occurred. The Commission, nevertheless, believes that the issue is so vital to the executive budget system that a specific prohibition ought to be included in the new constitution.

The first sentence of this draft section retains the substance of the provisions of Article III, Section 52(6) of the present Constitution which permit the General Assembly to amend the budget bill by increasing the items relating to the General Assembly and the items relating to the judiciary, and striking out or reducing any items. This preserves in the legislative branch some measure of control over the budget of the legislative and judicial branches.

The balance of this draft section incorporates the substance of the remainder of Section 52(6) with the exception of the provision relating to the inability of the governor to veto the budget bill which is provided in draft Section 6.08.

[225] See the comment to draft Section 6.01.

Section 6.08. **Enactment of Budget Bill.**

The budget bill shall become law when passed by both houses of the General Assembly and shall not be subject to veto by the governor. If the budget bill has not been enacted within fifty days after its introduction, it shall become law in the form in which it was introduced and any amendment or supplement thereto shall be treated as a supplementary appropriation bill.

Comment:

This draft section is new. A number of experts who testified before the Commission addressed themselves to the problem of legislative delay occasioned by the budget bill. The Commission concluded that legislative work on the budget bill could be completed sooner if the General Assembly did not engage in seemingly unnecessary detailed analysis and confined itself to the broader aspects of the budget bill. As pointed out above, it was for this very reason that the Commission on Administrative Organization of the State recommended substitution of the program type budget for the line-item budget.

The Commission feels that the imposition of a time limit upon legislative consideration of the budget bill would encourage a broader, program-by-program analysis by the General Assembly; allow more time for careful legislative consideration of supplemental appropriation bills; and reduce the pressure for a continuing legislative session by promoting the dispatch of legislative business more promptly. Accordingly, the Commission recommends that if the budget bill shall not have been finally acted upon by the General Assembly within fifty days after its introduction, it shall become law in the form and tenor of its original introduction. In the case of a newly elected governor, this time limit will expire eight days before the end of the regular session; and in other cases, twenty days before the end of the session.

To prevent abuse of the time-limit provision by the governor, who could, conceivably, amend his budget one day before it automatically became law and thus obtain provisions not even considered by the General Assembly, the Commission recommends the inclusion of the second clause of the second sentence. This clause provides, in substance, that any amendment or supplement made to the budget bill as originally introduced will not automatically become law if the time limit is reached, but will be governed by draft Section 6.10 relating to supplemental appropriation bills.

The first sentence of this draft section is recommended on the ground that the constitution should affirmatively state when, in the normal course of events, the budget bill becomes law and that the budget bill is not subject to the governor's veto. The substance of these provisions presently exists in the last clause of Article III, Section 52(6) of the present Constitution.

Section 6.09. **Testimony on Budget Bill.**

Either house of the General Assembly may require any person in any branch or agency of the state government, other than the governor, to appear and testify with respect to the budget bill or a supplementary appropriation bill. The governor or a person designated by him shall have the right to appear and testify with respect to the budget bill or a supplementary appropriation bill.

Comment:

This draft section treats in a simplified and unified manner the subject of the relative rights and duties of the governor and the General Assembly with respect to the preparation of and hearings on the budget bill. This subject matter is now covered in the first sentence of Article III, Section 52(11), in the first sentence of Section 52(12) and in Section 52(7) of the present Constitution.

The Commission believes that the power granted to and the duty imposed upon the governor in the first sentence of Section 52(11) and in the first sentence of Section 52(12) with respect to the gathering of information from state officials and the holding of public hearings on budget estimates are inherent in the powers and duties of his office and do not require specific statement in a new constitution.

The Commission believes, however, that the substance of Section 52(7), stating the rights and duties of the governor and the General Assembly with respect to the furnishing of explanations and information to the General Assembly, ought to be retained in order to insure that the General Assembly is adequately informed on all aspects of the budget bill. In addition, the governor or a person designated by him ought to have the right to appear and testify with respect to the budget bill, but the Commission believes it inappropriate to permit the General Assembly to require the governor to appear personally before it for this purpose.

Section 6.10. **Supplementary Appropriations.**

Any other appropriation shall be embodied in a separate bill, called a supplementary appropriation bill, which shall be limited to some single work, object or purpose clearly defined therein. A supplementary appropriation bill may not be considered by either house until the budget bill has become law, but may be considered and enacted thereafter in a regular session or at any time in a special session. A supplementary appropriation bill shall provide the revenue necessary to pay the appropriation by a tax, direct or indirect, to be levied and collected as prescribed therein, or in the case of a budget bill amendment or supplement which has not become law by funds available therefor in conformity with the estimate of revenues contained in the budget or any supplement thereto.

Comment:

This draft section continues, in substance, the provisions of Article III, Section 52(8) of the present Constitution dealing with supplementary appropriation bills.

All the witnesses who appeared before the Commission were strongly of the opinion that there should be no relaxation of the rule prohibiting any money bill from moving through the General Assembly until after the budget bill has been enacted. The Commission, therefore, considered but rejected a suggestion that supplemental appropriation bills be permitted to pass one house prior to enactment of the budget bill. This draft section continues the existing prohibition.

This draft section also contains the following substantive provisions which are found in existing Section 52(8):

1. Neither house shall consider other appropriations until the budget has become law.

2. Such other appropriations shall be embodied in a separate bill limited to a single work, object or purpose.

3. Each supplementary appropriation bill shall provide the revenue necessary to pay the appropriation.

4. Every supplemental appropriation bill shall become law only upon receiving the favorable vote of a majority of all the members of each house.

5. The governor shall have the right to veto any supplementary appropriation bill.

This draft section, however, unlike the present Constitution, also provides that a supplementary appropriation bill may be funded by surplus, by changing the revenue estimates or by the governor's change of previously made revenue estimates. As a matter of fact, the present practice is for the governor to provide for the funding of a supplementary appropriation bill by this means. Accordingly, this change merely allows that which seemingly is not allowed at the present time, but which is done in fact, that is, to fund a supplementary appropriation bill through a change in the revenue estimates.

ARTICLE VII. LOCAL GOVERNMENT

Introductory Comment:

From the outset of its work the Commission recognized the need for extensive revision of those provisions in the present Constitution pertaining to all levels of local government, in order to achieve viable local government, unburdened by crippling restrictions emanating from state authority. The need for constitutional revision with respect to all provisions relating to local government is one of the most compelling reasons for the State's entire constitutional revision effort. The determination of what adjustments should be recommended and the drafting of model provisions regarding local government have commanded the Commission's very thoughtful and arduous attention.

The Commission's Committee on Political Subdivisions and Local Legislation began its deliberations on a semimonthly basis in September, 1965. In addition to its own very detailed study of the provisions of the present Constitution with respect to local government and also the relevant provisions of other state constitutions, the Committee met with numerous consultants. The Committee discovered early that its assignment was difficult because of the large variety of alternatives, and combinations of alternatives, available to it to be studied, digested, and evaluated.

In the course of the year during which the Committee was formulating its recommendations, it drafted numerous proposed articles on local government for its own consideration and for that of the Commission. The first of these drafts was a reorganization of provisions similar to those in Articles 11-A, 11-B, 11-C, 11-D, 11-E and 11-F of the present Constitution.

As additional drafts were prepared, there evolved a framework of relationships between the various categories of local government. From the discussions emerged a philosophy as to the relative strengths and abilities for expansion which should be imparted to the various categories of local government. The most basic principle determined and that which the Commission has adopted as the cornerstone of its recommended draft article on local government is that the county should be the primary unit of local government in Maryland.

As in other states, local government in Maryland is a creature of the State, established in an exercise of the State's sovereignty to perform specific functions within a defined geographical area. From the beginning, Maryland local government has centered around the creation and development of the county and the incorporated municipality. Each came into existence in Maryland more than two hundred fifty years ago; each began as an essentially separate and distinct legal entity, established in response to differing historical necessities and designed to perform basically different functions.

The county in Maryland originally served as little more than a broad geographic area within which certain governmental functions, particularly those relating to the judicial and record-keeping functions, could be locally administered.

St. Mary's County was the first county in Maryland, having been created in 1637 by an order of the governor. By 1776, eighteen counties, primarily in the area surrounding the Chesapeake Bay, had been established. Except for Gar-

rett County, which was created in 1872, and Wicomico, which was created by the Constitution of 1867, Maryland's other twenty-one counties, substantially as they exist today, had come into existence prior to 1867.[226]

During the colonial period, almost fifty years after the creation of the first county, the formal process of establishing municipal governments was initiated. The "Town Act," the first act which systematized the establishment of cities and towns in Maryland, was passed in 1683, authorizing the colony to select land sites, establish communities, and provide for their government.

In 1960, Maryland's incorporated municipalities numbered one hundred fifty-two.[227]

Unlike many other states, there are neither township governments nor independent school districts in Maryland. Moreover, of the State's twenty-three counties ten contain no more than four incorporated municipalities and two contain none.[228] This has resulted in a relatively low number of local governmental units. Indeed, one of the present strengths of local government in Maryland is the absence of a multiplicity of local governmental units with the consequent overlapping of functions. There is, however, considerable variation in the organization of the local governments and in the responsibilities borne by them.

Local-state relations in Maryland are characterized by extensive state administrative and legislative control. Administrative control may take a variety of forms, including gubernatorial appointment of certain local officials; state agency participation in the appointment or certification of special local officials and employees; supervision of local program formulation, administration, and records management; and state requirements of periodical financial and other reports. Although such controls directly affect local operations in standards and performance, of far more significance have been the nature and scope of legislative control. Within constitutional limits, the power and role of the General Assembly in the enactment of legislation for local government have particularly dominated local-state relations and have brought about a system of local-legislative relations uniquely characteristic of the Maryland governmental system.[229]

The provisions of the Maryland Constitution have effectively placed in the General Assembly fundamental and far-reaching control over local governments. Constitutional restraints or prohibitions on the passage of general legislation, applicable to all counties, are virtually nonexistent. In this respect, the Maryland Constitution varies from those of many other states which spell out in considerable detail sundry aspects of and requirements for local governments.

Further, those provisions which do relate specifically to local government, and

[226] For a discussion of the history, dates, and boundaries of Maryland counties, see MATTHEWS, THE COUNTIES OF MARYLAND, THEIR ORIGIN, BOUNDARIES, AND ELECTION DISTRICTS (Maryland Geological Survey Special Publication 1907).

[227] SPENCER, CONTEMPORARY LOCAL GOVERNMENT IN MARYLAND 10 (Univ. of Md. Bureau of Governmental Research 1965) (hereinafter cited as SPENCER, CONTEMPORARY LOCAL GOVERNMENT IN MARYLAND).

[228] Anne Arundel (two); Baltimore County (none); Calvert (three); Charles (two); Harford (three); Howard (none); St. Mary's (one); Somerset (two); Talbot (four); Worcester (four).

[229] SPENCER, CONTEMPORARY LOCAL GOVERNMENT IN MARYLAND 14, 15.

which would thereby limit or restrain action by the General Assembly in such areas, are relatively few and limited in scope. Some of those provisions as often affirm as limit action by the General Assembly. Article VII, Section 1 of the present Constitution, for example, sets forth the manner of the election of county commissioners, but further authorizes the General Assembly to prescribe the compensation, powers and duties of such officials.[230] Other provisions which relate directly to local government deal primarily with the manner in which certain other local offices shall be filled,[231] with certain limits on the powers of counties to contract debts,[232] and with the power of the General Assembly to create new counties.[233]

LOCAL LEGISLATION

The Maryland Constitution, also unlike that of many other states, does not substantially prohibit the General Assembly from enacting local legislation—that is, laws which are applicable only to the residents of either a single or a few political subdivisions. Moreover, the general public laws which are enacted by the General Assembly are often amended to exempt specific political subdivisions.

Maryland has gone further than most other states in empowering the General Assembly to enact local laws. As one observer expressed it in 1944: "The other states in the Union, probably without exception, impose greater restrictions upon the passage of local and special laws than does Maryland."[234]

The procedures of the General Assembly for considering local legislation have themselves prompted a unique development of the organization and procedures of the General Assembly. Local bills usually are introduced either by a delegate from the county concerned or by a senator from the district in which the county is located. Local bills are subsequently referred to select committees in each house for consideration. These committees are concerned only with local legislation.

In the Senate, a senator from the county concerned will sit on the select committees with two other senators, usually from neighboring counties. In the House of Delegates, a select committee is composed of the delegates from the county affected by the bill.

The General Assembly will ordinarily enact any local bill or accept any exemptory amendment recommended by one of its select committees as a matter of legislative courtesy, unless such action would seriously interrupt or conflict with a statewide program. Thus, the delegation to the General Assembly from each county and Baltimore City constitutes a "little legislature" and possesses enormous power with which to shape or influence the programs and operations of its county.

An exception to this procedure has resulted from two amendments to the present Constitution, Article XI-A and

[230] Those provisions governing the manner of election or apportionment of certain local officials include: Article IV for certain judicial offices and court officers; Article VII, county commissioners and surveyors; Article XI, the Mayor and City Council of Baltimore City; Article XVII, which requires four-year terms for all elected county officials.

[231] MARYLAND CONSTITUTION article V, section 7; article VII, sections 1 and 2; article XI, section 1.

[232] MARYLAND CONSTITUTION article III, section 54.

[233] MARYLAND CONSTITUTION article XIII, section 1.

[234] EVERSTINE, LOCAL GOVERNMENT: A COMPARATIVE STUDY 54 (Legislative Council of Md. Research Report No. 23, 1944).

Article XI-E. These amendments have contributed substantially to clarifying certain aspects of local responsibilities for local laws. The first of these, adopted in 1915, enables counties and Baltimore City to participate in and assume responsibility for the passage and effect of local legislation on specified subjects. Under this provision four counties and Baltimore City have adopted charters and have thus acquired some degree of "home rule" power.[235]

The second amendment, adopted in 1954, grants to all municipalities certain "home rule" powers and has substantially clarified the relationship between municipalities and the General Assembly since its adoption in 1954. In addition, Article XI-F, ratified in 1966, establishes "code home rule" as a second form of county "home rule," which is in many ways similar to municipal "home rule" in Maryland.[236]

It is significant that in 1944 the Legislative Council reported that from sixty per cent to sixty-five per cent of the bills introduced and passed during a regular session of the Maryland General Assembly were local, concerning only individual counties. In that same year, it was observed:

> "The consideration of local legislation requires a substantial share of the time and energies of members of the General Assembly. In this respect Maryland occupies almost a unique position among the states, for its legislature gives perhaps more attention to the details of local government than does the legislature of any other state in the Union."[237]

A detailed study of the 1965 session of the General Assembly indicated that of the 1,212 bills introduced in the House of Delegates, 483, or forty per cent, were local bills. Of the 678 bills introduced in the Senate, 314, or forty-six per cent, were local bills.[238] This would indicate that although some counties and Baltimore City have acquired "home rule" powers, the problem which remains with respect to the other counties in Maryland continues to be significant.

The practice of the General Assembly of acting upon large quantities of local legislation has been subject to much criticism. It has been urged that the role of the General Assembly in enacting local legislation blurs public understanding of the relationship between local programs and the State, and makes it extremely difficult for the public to place responsibilities for the passage of local laws or for inaction with respect to critical local problems. Although a delegation to the General Assembly ordinarily will work closely with local elected officials, differences between the two can result in the passage of local legislation which is objectionable to local officials

[235] Four counties (Montgomery in 1948, Baltimore in 1956, and Anne Arundel and Wicomico in 1964) have adopted charter governments with special departments and officers which perform functions formerly exercised by the Board of County Commissioners.

[236] For the meaning of "charters" for counties and Baltimore City, see SPENCER, CONTEMPORARY LOCAL GOVERNMENT IN MARYLAND 19-26. For the meaning of "Code Home Rule" for counties, see SPENCER, CONTEMPORARY LOCAL GOVERNMENT IN MARYLAND 26-32.

[237] EVERSTINE, LOCAL GOVERNMENT: A COMPARATIVE STUDY 1 (Legislative Council of Md. Research Report No. 23, 1944).

[238] Slomoff, "Second Review of Legislation," 1967 (Monograph among unpublished papers of Maryland Constitutional Convention Commission in ENOCH PRATT LIBRARY, UNIVERSITY OF MARYLAND LIBRARY, MARYLAND STATE LIBRARY, JOHNS HOPKINS UNIVERSITY LIBRARY).

or it can result in the failure of the General Assembly to enact needed legislation specifically requested by them. This situation tends to discourage local participation in the legislative process by which local laws are enacted.

BROAD GRANT OF POWER

If the answer to the question of where the power to enact local legislation should reside is the county, an additional and equally perplexing problem arises as to what the nature of the grant of power to the county should be. Should the grant of power be in the form of specific delegations of power to enact legislation on certain subjects, or should the grant be a broad general grant which is limited only by specific acts of legislation by the General Assembly.

The experience of the past has been that most grants of power by the State to local governments have been specific delegations of power. Rules of construction judicially applied to grants of local government power developed slowly. Any vestige of the counties having any inherent powers or of their receiving the benefit of liberality in the construction of delegated powers[239] was swept away by the Dillon Rule, which was enunciated in 1872 and which was the composite of several independent concepts of diverse origin. The Rule stated:

> "It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words;* second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable."[240]

This rule was formulated in an era when rural-dominated legislatures were jealous of their power and when city scandals were notorious. It has been the authority, without critical analysis of it, for literally thousands of subsequent cases. It is fair to conclude from the footnotes of Dillon's first edition that he was reinforced in his statement of the rule by the anti-city feeling of the time.

Since in forty-eight states, Alaska and Texas excepted, the Dillon Rule governs—*i.e.,* no local power exists unless it is expressly delegated or clearly implied—express statutory denials of local authority are less important generally, except for tax rate and debt limitation, than denials by omission.

RECOMMENDATIONS

It is against this background that the Commission's recommendations with respect to the county level of local government must be viewed. The Commission believes that county government must be strengthened as the basic unit of local government in the State. To this end, it recommends that "home rule" be required for every existing county whether or not it has formerly adopted a charter. The Commission further recommends that the State through the constitution give to the counties a broad grant of power which, in effect, would give them all residual powers, all those powers which are neither specifically withheld nor subsequently withdrawn by the Gen-

[239] Willard v. Newburyport, 12 Pick. 227, 229-32 (Mass. 1831); Smith v. Newbern, 70 N. C. 14, 19 (1874).

[240] Dillon, Municipal Corporations 173 (2d ed. 1873).

eral Assembly. This recommendation would also relieve the General Assembly from the time-consuming exercise of considering matters which are purely of local import when it should be concerned with statewide problems.

The Commission believes that a democratic and responsive government can best be obtained if local governments, elected by the people, are free to solve local problems without first securing the prior approval of the General Assembly. In addition, the citizenry will be able to follow clearly the course of proposed local legislation, and the local elected officials will not be able to evade responsibility for the enactment or rejection of local legislation.

MULTI-COUNTY GOVERNMENTAL UNITS

In our present society it is increasingly difficult for small units of government to perform the technical and complex functions needed and demanded by the people. Units of local government overlap unnecessarily and, except for the continued absence of school districts, the number of special units of local government continues to increase rapidly. Nearly everywhere there are too many independent and semi-independent special agencies of local government being established.

The means by which area-wide governments have been provided to solve the problems arising from the growth of densely populated urban or metropolitan areas have varied widely. They have included growth and consolidation by annexation, consolidation by merger, federation, the urban county plan and others. Space does not permit a detailed consideration of these various methods. They will be discussed more fully in a research monograph which the Commission is causing to be prepared and which will be available to the delegates to the Constitutional Convention.[241]

These problems were also discussed at the Conference on the Modernization of Local Government which was held at Goucher College on December 9 and 10, 1966. The conference was convened and sponsored by Goucher College, The Johns Hopkins University, Morgan State College and the University of Maryland at the request of the Commission and discussed ways in which the present Constitution of Maryland could be revised to empower local units of government to respond more readily to current demands for expanded services and facilities. Some eighty-five leaders of local government in Maryland and other Marylanders with practical experience in local government were invited. Also in attendance was a panel of out-of-state experts.[242] The transcript of

[241] "Methods of Providing for Local Government of Metropolitan Areas," 1967 (Monograph among unpublished papers of Maryland Constitutional Convention Commission in Enoch Pratt Library, University of Maryland Library, Maryland State Library, Johns Hopkins University Library).

[242] Dr. John Bebout, Director, Institute of Urban Affairs, Rutgers University; The Honorable Beverly Briley, Mayor of Nashville-Davidson County, Nashville, Tennessee; Dr. Carlton Chute, Department of Public Administration, New York University; Mr. William Colman, Director, Advisory Commission on Intergovernmental Relations; Dr. Lorene R. Cumming, Ontario Department of Municipal Affairs; Dr. Luther Gulick, Institute of Public Administration; Dr. Victor Jones, University of California, Berkeley, California; Mr. John Keith, Executive Vice-President, Regional Planning Association of New York (City); and Mr. James A. Norton, Director, Greater Cleveland Association.

the conference proceedings will be available to the delegates of the Constitutional Convention.[243]

One criticism of the present Constitution is that it prevents or makes extremely difficult a decrease in the number and increase in the size of local units of government by: (a) freezing the existence of units smaller than counties, (b) establishing specific counties, (c) regulating change of county boundaries, and (d) requiring specific majorities of the electorate in consolidation and mergers.

Accordingly, the Commission believes that the authority by which local governments divide and incorporate, and by which independent *ad hoc* agencies are created, should be made more restrictive. Conversely, the authority by which local governments disestablish, consolidate or merge should be made less restrictive, and the authority of *ad hoc* agencies should be subject to the authority of general local government. These recommendations are strongly supported by the Advisory Commission on Intergovernmental Relations.[244]

The Commission believes that the draft provisions which it recommends with respect to the counties, municipal corporations, and multi-county governmental units will implement these policies to the extent to which it is desirable for them to be implemented in the constitution. While the Commission has placed primary emphasis upon strengthening county governments as the basic unit of local government, this draft article permits the General Assembly to establish different forms of local government, other than municipal corporations, when and if the need arises. In accordance with the Commission's belief that the constitution should be adaptable to the changing conditions of the future, this draft article provides for a maximum amount of flexibility in the organization and powers of local units of government.

Although subscribing firmly to the principle of prescribing maximum flexibility and freedom of action for local units of government in meeting the needs of their citizens, the Commission, nevertheless, also believes it desirable that certain limitations on the exercise of "home rule" by political subdivisions be written into the constitution. The Commission recommends that the State reserve sufficient authority in the General Assembly to enable it to act where necessary to modify the responsibilities of and the relationships among local units of government located within a region where such action would be in the best interest of the people of the region as a whole.

The Commission thus proposes that the State adopt a modification of the "home rule" concept, to wit: county home rule for strictly local problems; regional government for area-wide problems, but with the State free to legislate and otherwise act with respect to the problems which transcend the county boundaries. The Commission believes that the State is well advised not to lose the opportunity in the normal process of constitutional change to make sure that constitutional "home rule" provisions are so modified as to ensure that the authority of the State with respect to its

[243] This transcript has not yet been published, but it is anticipated that it will be published prior to September 1, 1967.

[244] [U. S.] Advisory Commission on Intergovernmental Relations, State Constitutional and Statutory Restrictions upon the Structural, Functional and Personnel Powers of Local Government 64 (Oct. 1962).

densely populated urban areas is not unduly restricted.

Because of the rapid changes taking place in large metropolitan areas with respect to the methods by which particular governmental services are provided, it is necessary that the State be in a position to afford leadership, stimulation, and, where necessary, supervision with respect to metropolitan area problems. This is especially the case where the metropolitan areas extend into more than one county, because in such a situation, there is no authority short of that of the State which can be brought to bear upon the area involved.

In densely populated urban areas, governments with area-wide powers may be needed to make effective decisions about the areas' transportation network, its broad pattern of land use, the contamination of air and streams, and its common recreational and open-space needs. Failure to establish such governments with wide powers when needed may very well lead to a greater loss of self-determination in local affairs through the continuous transfer of responsibility to the state and federal governments.

Some such unit of government may become necessary to serve area-wide needs, determine priorities for the use of public funds, and develop integrated funds for transportation, land use, water supply, control of pollution, and other functions. Such governmental units should have the breadth to see a problem as a whole; a mechanism for formulating policy issues for voters; the ability to arrive at real decisions; the power to act through administration, regulation, and taxation; and a procedure by which they can be held responsible by the voters.

In July, 1966, the Research and Policy Committee of the Committee for Economic Development issued a report in which it stated:

> "It is time for the citizens of the 50 states to take stock of their systems of local government in relation to urgent present and prospective needs. This involves more than an assessment of current performance. It also demands a judgment of future capabilities in planning and executing activities essential to healthy community development. As we approach the twenty-first century, weaknesses in eighteenth and nineteenth century forms must be corrected—or new systems created—if local government is to survive as a vital force."[245]

RECOMMENDATIONS

After much deliberation, the Commission recommends that alternative mechanisms for establishing multi-county governmental units be prescribed in the constitution. The Commission does not recommend that any such units of government, either active or dormant, be created by a new consitution itself; however, it does strongly recommend that specific provisions for the method of creating such units in the future be included in a new constitution. In draft Section 7.03 the Commission proposes numerous alternative methods for the establishment of multi-county governmental units. Although it believes such units, when and if created, should be popularly elected representative governments, it also provides for the creation of intergovernmental authorities in draft

[245] Research and Policy Committee of the Committee for Economic Development, Modernizing Local Government to Secure A Balanced Federalism 11 (July 1966).

Section 7.06, in keeping with its additional belief that maximum flexibility should be permitted local governments in solving their problems.

Section 7.01. **Units of Local Government.**

For the purposes of this Constitution, Baltimore City shall be considered a county; "municipal corporation" shall mean an incorporated city, town or village, but shall not include Baltimore City or any county; "region" shall mean an area comprising all or parts of two or more counties.

Comment:

This draft section defines the terms used throughout this draft article. This draft section categorizes Baltimore City as a "county" unit of local government for all purposes of the draft constitution. This is in keeping with Baltimore City's present characterization. The City became a governmental unit distinct from Baltimore County in 1851. Like the counties, it has its own delegation in the General Assembly, and constitutes a separate judicial circuit of the State. Moreover, the City alone composes the Sixth Appellate Circuit from which two of the seven judges on the Court of Appeals are selected.

In addition, Article I, Section 14 of the Annotated Code of Maryland (1957) states that as a rule of interpretation of the Code, Baltimore City shall be considered as a county, unless such construction would be unreasonable. Indeed, the constitutional and statutory status of Baltimore City is more akin to that of a county than to other municipalities of the State. The Commission believes that by defining Baltimore City as a "county" in a new constitution, its status as a unit of government is made clear.

In defining "municipal corporation" the Commission believes it desirable to state that such units of local government do not include any county or Baltimore City. This definition restricts the historical definition of "municipal" and defines it in terms of an incorporated unit of government within a county. The assignment of the term "municipal corporation" to a particular level of government should facilitate clarity when speaking of the relationships between various units of local government.

The term "region" is defined as a civil division which extends across county lines. Such a "region" may comprise all or parts of two or more counties, but not parts of adjoining states. The term "region," unlike the terms "municipal corporation" and "county," does not necessarily apply to an area over which there is a government whose jurisdiction coincides with the boundaries of the "region." The term "region" is also not synonymous with the term "metropolitan" in that "region" may be applied to a sparsely populated area which crosses county lines as well as to such areas with a high population density. The term "metropolitan" is applied to areas with a high population density, whether totally within or partially without a county, and whether or not coincidental with the boundaries of an incorporated municipality.

Section 7.02. **Establishment of Counties and Multi-County Governmental Units.**

The General Assembly may provide by law for the establishment, incorporation, change, merger, dissolution and alteration of boundaries of counties and multi-county governmental units, including intergovernmental authorities and popularly elected regional representative governments, but excluding municipal corporations. A law altering the boundaries of a county shall be enacted only by the affirmative vote of at least three-fifths of all the members of each house.

Comment:

This draft section allocates to the General Assembly the State's inherent power to determine the overall structure of local government in the State. Although the Commission recommends that the counties continue to be the basic units of local government, it recognizes that future population growth patterns may require the establishment of either revised or new units of local government.

This draft section provides that either the General Assembly may directly provide by law the needed adjustments in the structure of local government in the future, or it may provide by law for the means by which such adjustments may be made by either the existing units of local government or by those citizens who wish to band together in bringing about the desired adjustments. Where the General Assembly provides by law for local initiative and action, the General Assembly can also establish restrictions against the abuse of whatever power is granted.

In its deliberations the Commission concluded that in order to maintain a viable system of local government, the General Assembly must have the recognized power to alter the boundaries of local units of government. It also concluded that the General Assembly must have the power to create units of government between the state and county levels. Because the Commission believes that there should not be a proliferation of intergovernmental authorities, it debated at length whether, allowing for the future creation of regional governments, the constitution should contain an absolute prohibition against the creation of other intergovernmental public corporations, commissions, authorities, boards or special districts possessing the power to contract indebtedness, to collect taxes, or to collect revenues over an area smaller than the entire state.

The Commission concluded that in all probability different forms of regional governments and authorities would be required in different areas of the State in the future, and that the precise form that such governments or authorities should take could not be determined at the present time. Therefore, the Commission recommends that the General Assembly be empowered to establish, incorporate, change, merge, dissolve and alter the boundaries of multi-county governmental units, including either intergovernmental authorities or popularly elected regional representative governments.

Under the draft constitution the power to establish, incorporate, change, merge and dissolve municipal corporations, as well as the power to alter their boundaries, is delegated to the counties, thus removing it from the purview of the General Assembly. This specific recommendation is further discussed in the commentary to draft Section 7.14.

This draft section prescribes that the General Assembly may provide by law

for the alteration of the boundaries of counties. As has been previously stated, the General Assembly may exercise this power by providing a procedure for the counties themselves to alter their boundaries or it may enact a law which directly alters the boundaries of a county. The Commission considered numerous suggestions of provisions which should be applicable if the General Assembly were directly to alter the boundaries of a county. These suggestions were primarily premised upon there being a referendum of one or another group of the citizenry who would be affected by a proposed boundary alteration.

One suggestion was that the alteration of a county boundary should require a majority vote in a mandatory referendum of those voters in the area acquiring new territory. A second suggestion was that the alteration of a county boundary should require a majority vote in a mandatory referendum of those voters in the area which is to be acquired as a result of the boundary alteration. A third suggestion was that there be a separate mandatory referendum in each of the previously mentioned areas and that a boundary alteration require a favorable vote of the majority of the voters in each. A fourth suggestion was that there be a separate mandatory referendum in the area from which territory would be taken.

All of these suggestions were rejected by the Commission by votes of better than two to one because the Commission believes that any of the proposed requirements would have the undesirable effect of precluding any change whatsoever and, for all practical purposes, would restrict the State in any efforts to resolve the pressing problems arising from urbanization. Another suggestion was made that where the boundaries of three or more counties would be altered by the same proposal, then a referendum, if mandatory, should be statewide rather than of the voters living in any particular area. Although this approach appealed to a majority of the members of the Commission, it was considered as the second choice of the various alternative approaches available.

As a compromise, and as a restraint upon the General Assembly against improvident action, the Commission recommends that in those cases where the General Assembly directly alters the boundaries of a county, such change be enacted only upon the approval of at least three-fifths of all the members of each house of the General Assembly. Under this approach no referendum would be mandatory; although, the General Assembly could prescribe referendum procedures under its general authority.

REGIONAL GOVERNMENTS AND INTERGOVERNMENTAL AUTHORITIES

Section 7.03. **Establishment of Regional Governments.**

Upon the establishment by the General Assembly by law of the boundaries of a region, a popularly elected representative government for the region, and the instrument of government therefor, may be created by the General Assembly by law, or by the counties within or partly within the region acting concurrently by law, or by affirmative action of a majority of the registered voters of the region voting upon a plan proposed by a petition signed by a number of registered voters of the region equal to at least five per cent of the vote cast in the region for governor in the most recent gubernatorial election.

Comment:

This draft section is the first of four which prescribe the procedures for and the restrictions upon the creation of units of local government at the multi-county level, be they popularly elected regional representative governments or intergovernmental authorities. The Commission recommends that provisions for the creation of multi-county regions and regional representative governments, as well as for the creation of intergovernmental authorities, be included in a new state constitution because it believes that there is a need for modernizing governmental structures in multi-county and metropolitan areas to enable them to carry out more efficiently and effectively those public responsibilities which are clearly area-wide in scope. It also believes that the trend toward the adoption of area-wide governments and authorities to cope with the problems arising from metropolitan growth suggests that it would be improvident for a new constitution to ignore either the situations where they can be used or restrictions upon them.

The need for changing the geographical jurisdictions and powers of local government in many of our metropolitan areas arises because of the growing maladjustment between what these governments are called upon to do and their ability to perform. More specifically, the present powers, jurisdictions and structures of local governments, and the status of intergovernmental relations in the metropolitan areas, make it increasingly difficult for the local government to perform independently many functions which are inevitably area-wide in nature.

In a paper, *The Metropolitan Problem,* which was published in June of 1960, the Greater Baltimore Committee, Incorporated, stated:

> "The metropolitan problem has become more acute in a setting of continuing growth in metropolitan areas in number, population, territorial size and governmental capacity. The basis of the problem is the absence of general local governmental organizations broad enough to cope with metropolitan needs. There is a lack of area-wide governmental jurisdiction that can effectively provide and finance services, that can plan and regulate and that is constructed to facilitate adequate accountability to the metropolitan public for their actions."[246]

A recent editorial in the *Baltimore Magazine* stated:

> "When the idea of metropolitan cooperation is advanced as the answer to meeting problems common to Baltimore's metropolitan area, the objection most frequently raised centers around the reluctance of local governments to surrender any of their autonomy. This is an important factor, to be sure, and should not be dismissed lightly."

The editorial continues:

> "Indeed, we have already taken a few preliminary steps along the road to metropolitan cooperation. The establishment of the Metropolitan Transit Authority was the first such step, followed by the Regional Planning Council. Both agencies have been organized to deal with metropolitan problems that cut across invisible political boundaries.

[246] A copy may be found in the MARYLAND STATE LIBRARY.

"Early this year (1966), the heads of government in Baltimore City and two adjacent counties set up an informal Metropolitan Council, the purpose of which was to make possible municipal cooperation in such areas as teacher recruitment and the purchase of supplies and equipment.

"To be sure these are but a beginning—yet they are steps in the right direction."[247]

It is not a question, therefore, whether local governments in multi-county, urban areas should be reorganized to participate in federal-state-local programs. Basic structural changes in local government, with political changes flowing therefrom, are inevitable and are, in fact, already underway. The question is whether the elements of a multiple-purpose general government are to be the model for the formal institutions of regional government or whether local government is to deteriorate into a collection of special functional governments.

Local officials often mistakenly view a general regional or multi-county government, even though its functions be limited to those that are considered to be area-wide in scope, as the principal threat to local autonomy. This kind of multi-county or regional government can be organized and controlled by the officials of the municipalities and counties comprising the metropolis. The danger lies in the step-by-step but cumulative removal of activity after activity out of reach of the periodic determination by the community of how its limited resources will be allocated through the grant of fiscal, administrative, and political autonomy to special interests organized as special districts or authorities.

Failure to establish multi-county or regional governments with wide powers may lead to a greater loss of self-determination in local affairs through the continuous transfer of responsibilities to the state and federal governments. The Commission believes that governmental policies should be developed and carried out at the level of government closest to home; however, matters such as transportation, air pollution, and the like cannot be tackled by small local jurisdictions. A multi-county or regional level of government could cope with these problems without sacrificing local controls.

In addition, there are reasons to believe that an integrated approach to an area-wide problem such as transportation is, over the long run, more efficient and economical per unit of service provided. Because the Commission believes that there are a number of problems, such as the absence of a public policy with regard to the provisions of open space for future development and recreational needs, which are not being met adequately or at all for lack of an area-wide approach, and because these problems are of such mounting importance that sooner or later they will compel governmental action, the Commission recommends that there be specific provisions in a new state constitution to guide the formation of multi-county regional governments.

The Commission recommends that before any regional government may be created, the General Assembly must establish by law the boundaries of the regions for which the government will be created. This, in a sense, gives to the General Assembly a veto power over the

[247] Dec. 1966, p. 80. In the same issue also see "Where Metro Government Works," pp. 17-19.

creation of a regional government; but, more importantly, it assigns to the General Assembly the responsibility for mapping out a master plan of regions. This will assure that regions will neither overlap nor be formulated in such a way as to leave a small area isolated outside the structure of regional governments.

Draft Section 7.03 leaves to the General Assembly the determination of when to delineate one or all of the State's regions; although it may well be that the General Assembly will want to study and legislate a system of regions at its first session following the ratification of a new constitution. Feeling that the need already exists for some regions, the Commission debated at great length the degree to which regions should actually be established by the constitution.

One proposal was that the State should be divided by law into not more than five departments, each of which should consist of a contiguous geographic area comprising one or more, or parts of one or more, counties; and that in the event that a law dividing the State into departments was not to become effective on or before June 1, 1970, the State should thereupon be divided into the five departments specifically set forth in the constitution, but subject to boundary alteration by law at any time.[248]

[248] These five proposed departments were: the Western department comprising Allegany, Garrett and Washington counties; the Southern department comprising Calvert, Charles and St. Mary's counties; the Eastern department comprising Caroline, Cecil, Dorchester, Kent, Queen Anne's, Somerset, Talbot, Wicomico and Worcester counties; the Baltimore department comprising Baltimore City and Anne Arundel, Baltimore, Carroll, Harford and Howard counties; and the Washington department comprising Frederick, Montgomery and Prince George's counties.

Another proposal was that the constitution should provide that the State must be divided by law into five or fewer regions for which regional representative governments could be established whenever the General Assembly, the county legislative bodies within a region, or the majority of the registered voters voting upon a petition submitted by the residents of a region determined it appropriate to initiate such a government. This approach would have the General Assembly create dormant regions at its first session following the ratification of a new constitution, which could then be activated upon the initiative of any one of three specified agencies or groups whenever it is determined appropriate to act.

After much deliberation, the Commission concluded that it should recommend that the General Assembly be empowered to determine the delineation of the regions whenever it thinks such action appropriate. Under this recommendation, there is neither a limit on the number of regions which the General Assembly might create nor is it necessary that all the regions be circumscribed simultaneously. The effect of this would be that the General Assembly could, for example, establish as a region the area of Maryland adjacent to Washington, D. C., in 1970 and could wait until 1980 to create as a region the area comprising metropolitan Baltimore, or vice versa.

This draft section also prescribes that once the boundaries of a region have been established by the General Assembly, three alternative methods are available for the creation of a representative government for the region: by action of the General Assembly by law; by the concurrent action by law of all the counties within or partly within the region; or by the affirmative action of

a majority of the registered voters of the region voting upon a plan proposed by a petition signed by a number of registered voters of the region equal to at least five percent of the vote cast in the region for governor in the most recent gubernatorial election. Three alternatives are made available in the belief that maximum flexibility is desirable, and that action should be feasible upon the initiative of any of the three groups of persons and without the approval of or without being subject to the veto of any one of the other two.

The Commission strongly believes that a multi-county or regional government should be constituted by representatives who are directly elected by the people who live in the region. The term "popularly elected regional representative governments" was chosen with care by the Commission to reflect the view that every regional government which is created should be composed of representatives who are elected directly by the people residing in the region rather than of persons appointed or elected by the governing boards of smaller units of local government. When a popularly elected representative body determines overall policy, it is likely to be more responsive to its electorate in making decisions.

Although the provisions of draft Section 7.03 for the establishment of regional governments are not the exclusive means by which multi-county governmental units may be created, they do prescribe a specific method for inaugurating the preferable form of area-wide government, a popularly elected representative government. To this extent, the Commission believes that the inclusion of draft Sections 7.03, 7.04 and 7.05 in a new constitution is most desirable for guiding the development of government in Maryland beyond the present.

Section 7.04. **Change of Structure of Regional Government.**

The instrument of government for a region shall provide for amendment of the instrument by the affirmative vote of a majority of the voters of the region voting on an amendment submitted by the governing body or by petition of the voters in accordance with the provisions of the instrument.

Comment:

This draft section requires that any instrument of government for a region, such as a charter, include a provision for its amendment by the favorable vote of a majority of the voters of the region voting on an amendment submitted either by the region's governing body or upon the petition of voters themselves. The Commission recommends this provision to ensure that when a regional government is established by the General Assembly, rather than either by the concurrent action of the counties which form the region or by the voters who reside in the region, both the resident voters and the regional government will have an opportunity to initiate changes in the structure of the government.

Section 7.05. **Powers of Regional Governments.**

Powers may be vested in a regional government either by all counties within or partly within a region relinquishing powers to the regional government by law, by the General Assembly by law withdrawing specified powers from all counties within or partly within a region and conferring the powers upon the regional government, or by the General Assembly by law delegating powers of the State to the regional government. A power conferred upon a regional government may

thereafter by law be relinquished by the regional government or be withdrawn by the General Assembly. In either event the power relinquished by or withdrawn from the regional government shall revert only to the respective counties or to the State, from which it originated.

Comment:

This draft section provides that such powers as may be exercised by a regional government will be those which are specifically delegated to it. The Commission recommends that there be alternative methods prescribed in a new constitution for the granting of powers to a regional government. Specifically, the Commission recommends that a regional government be able to acquire powers from the counties within or partly within the region by all of such counties relinquishing specified powers to the regional government by law. The Commission also recommends that the General Assembly be empowered to withdraw specified powers from the counties within or partly within a region and vest them in the regional government, and that the General Assembly be authorized to delegate powers of the State to a regional government.

Regardless of the means by which a regional government has acquired a particular power, the Commission recommends that the General Assembly have the specific authority to withdraw that power and that the regional government have the authority to relinquish the power. The Commission also recommends that whenever a power is withdrawn from or voluntarily relinquished by a regional government, the power lost by the regional government should revert only to the State or to the counties from which it originated. The Commission believes that this last recommendation is essential if the provisions recommended in this draft section are not to have the effect of undermining the powers of the "home rule" counties.

Section 7.06. **Powers of Intergovernmental Authorities.**

The General Assembly or a popularly elected representative local government may by law grant to intergovernmental authorities the power to impose and collect service charges, to borrow money and to collect taxes imposed by the General Assembly or by the popularly elected representative local government, but may not grant the power to impose taxes.

Comment:

This draft section is proposed as a limitation upon the amount of authority which can be granted or delegated to an intergovernmental authority. Specifically, it permits such authorities to be given the power to impose and collect service charges, to borrow money and to collect taxes imposed by the General Assembly or by a popularly elected representative local government. It prohibits the grant to such authorities of any power to impose taxes.

A limited-purpose multi-county authority is an independent governmental unit organized to perform one or more urban functions throughout part or all of a metropolitan area, including the central city.[249] Although a multi-purpose

[249] For a discussion of the use of metropolitan special districts and authorities, see [U. S.] Advisory Commission on Intergovernmental Relations, Alternative Approaches to Governmental Reorganization in Metropolitan Areas 49 (June 1962).

Also see [U. S.] Advisory Commission on Intergovernmental Relations, The Problem of Special Districts in American Government (May 1964).

authority has advantages over a single-purpose authority, it nevertheless often lacks the ability to coordinate the interrelated functions performed by the smaller units of local government which have overlapping jurisdictions.

When conventional special districts, agencies or authorities are created to deal with the expanding problems of metropolitan populations, the question arises as to how the governing board members should be selected and held responsible. Should they be appointed by the governor of the State, or by some local official, or should they be local officials already elected, or appointed, to some other governmental post?

Authorities are often composed of persons appointed by the governing bodies of the smaller units of local government which the authorities are organized to serve. Historically, such authorities have proven to be almost totally isolated from the electorate of the area in which they serve with the consequence that they are often not responsive to the wishes of that electorate. In many cases the governmental service requirements of the residents either are not met in the metropolitan aspects or are supplied by authorities which may be autonomous or remote from coordinated control.

Single and multi-purpose authorities have, however, been the most frequent means of coping with metropolitan needs or interests. Their boards show a diversity of representative bases. A minority of them are elected or made up of representatives of the constitutent units. State appointment or combined state and local appointment has been far more prevalent. The more general the unit of government, the greater is the need for local political representation.[250]

The constitutent unit system of representation assures the local governments of the means of control. Although the constituent-unit principle represents a more logical system of selecting district governing boards than do other methods of appointment, it is doubtful that it affords sufficient accountability to the electorate of the area served. Moreover, when local officials constitute such boards, the process of public control can be strange indeed. These members ran successfully for city or county offices in campaigns that rarely, if ever, were concerned with the affairs of the district. Nevertheless, if the voters become dissatisfied with the performance of the officials as district board members, they can recall them from the city or county office.

The Commission believes that in addition to the frequent remoteness from public control of the governing boards of authorities and special districts, such authorities and special districts are undesirable because of their generally restricted functional nature. A limited-purpose approach results in a fragmentary and usually uncoordinated attack on area-wide problems. Because of this belief, the Commission seriously considered recommending that a new constitution prohibit the use of such authorities altogether. However, the Commission concluded that maximum flexibility should be permitted local units of government in resolving their problems and that there might be instances where the best politically feasible solution

[250] For a general discussion, see BROMAGE, POLITICAL REPRESENTATION IN METROPOLITAN AGENCIES (Univ. of Mich. Institute of Public Administration 1962).

might be the establishment of an intergovernmental authority or special district.

The Commission thus recommends that a new constitution authorize local units of government to establish regional service corporations or authorities for the performance of governmental services necessitating area-wide handling, and that such authorities be permitted to have appropriate power to impose and collect service charges and to borrow money. Nevertheless, the Commission strongly recommends that such authorities be restricted from imposing taxes because of the belief of the Commission that the power to tax should be reserved to elected representative governments.[251]

COUNTIES

Section 7.07. **Powers of Counties.**

A county may exercise any power, other than judicial power, or perform any function which is not denied to it by this Constitution, by its charter or by a public general law which in its terms and in its effects is applicable to all counties or to all counties of the county's class, and which has not been transferred exclusively to another governmental unit.

Comment:

A number of the Commission's recommendations have related to various methods of ensuring that local governments have the powers they need to carry out their governmental responsibilities. Perhaps the most basic and far-reaching recommendation of the Commission to accomplish this purpose is one designed to overcome the effect of judicial decisions interpreting the powers of local government restrictively.

The Commission recommends in this draft section that the counties be given a broad grant of power in the form of "home rule." Such a grant would give to each county all functional powers not expressly reserved, pre-empted, or restricted by the county's charter, the state constitution, or public general law which in its terms and in its effects is applicable to all counties or to all counties of the county's class, or which have not been transferred exclusively to another governmental unit.

This draft section would itself restrict counties from exercising any judicial power. The Commission believes that this absolute prohibition is desirable as a complementary provision to its recommendations that the judicial system be operated entirely by the State.

The broad grant of power to the counties constitutes a somewhat new approach towards delineating the legal relationship between the State and local governments. This approach is one which has been highly recommended for delineating the legal relationship between municipal corporations and state governments in those states where the municipal corporation is the principal unit of local government.[252] This approach has also been generally recommended for "select units of local government" by the

[251] See comment to draft Section 8.01.

[252] For a review of "home rule" as recommended for municipal corporations, see Fordham & Asher, "Home Rule Powers in Theory and Practice," 48 Ohio State Law Journal (1948). Also see National Municipal Review 132-44 (1955).

Advisory Commission on Intergovernmental Relations.[253]

This approach is a sharp departure from Maryland practice under Articles XI and XI-A of the present Constitution which restrict counties to the exercise of only those powers specifically granted to them by the Constitution or by public general law. Nevertheless, the Commission anticipates that the broad grant of power to county governments will both revitalize them and stimulate their initiative as a result of unshackling them from the present severe restrictions upon their power. In addition, the Commission believes that the interests and sovereignty of the State are well protected by the provision that the General Assembly may deny prescribed powers to the counties generally, or to counties of a class, by public general law. Thus, for instance, taxing powers of a specified character could be denied to all counties by the General Assembly.

The most pronounced growth in county governments in Maryland has been the large-scale expansion of their functions, particularly those normally associated with municipal governments. This enlargement has involved both the performance of some functions at more intensified levels and the assumption of new activities. Numerous counties in urban areas, for example, have greatly broadened their public health services to combat communicable diseases, epidemics and unsanitary practices, and their social welfare programs to provide greater assistance to dependent children, the needy, the aged, and the blind. They have also launched into such new activities as developing and maintaining airports, building and operating public hospitals, installing sewers and operating sewage disposal facilities, and establishing and staffing large parks and recreational areas. A number of counties have also grown functionally by making contractual agreements with municipalities to perform certain services for them, such as tax assessment or collection.

The largest proportions of county money are spent on education, roads and streets, social welfare programs, and hospitals and public health.

Section 7.08. **Classification of Counties.**

Classes of counties, based upon population as determined by the most recent United States Census or upon other criteria, may be prescribed by law with not more than five classes and not less than three counties in any one class. No more than one classification shall be in effect at any one time but the classification may be changed at any time.

Comment:

This draft section permits the General Assembly to classify counties into reasonable groups for purposes of legislating public general laws which are applicable to all counties within one or another classification. This recognizes the possible need for the General Assembly to resolve problems which are unique to certain counties with common characteristics such as high population density, heavy air traffic, or intense economic activity. This approach would also permit classification on a regional basis should there be a desire for such classification.

[253] [U. S.] Advisory Commission on Intergovernmental Relations, State Constitutional and Statutory Restrictions upon the Structural, Functional and Personnel Powers of Local Government 72 (Oct. 1962).

If classification of counties is to be permitted, the Commission recommends that the counties be grouped into not more than five classes and that there be a prohibition against having fewer than three counties in any single class. In addition, the Commission recommends that a new constitution permit only one classification system to be in effect at any one time. Under this proposal, whenever the classification system is changed, all laws previously enacted with particular reference to one or another classification of counties would be automatically repealed by any alteration of the classification system. The Commission believes that the provisions of this draft section are essential to protect the integrity of the prohibition against the General Assembly enacting local legislation.

The Commission debated at length the question of whether classification should be permitted on a basis other than population. It concluded that although population was by far the most rational basis, in its judgment, for determining classes of counties; nevertheless, the need to achieve flexibility suggests that the constitution not restrict classification to a single criterion.

Section 7.09. **General Application of Laws.**

Except as otherwise specifically provided in this Constitution, the General Assembly may not enact any public local laws and, except with respect to appropriations, may enact only public general laws which in their terms and in their effects apply without exception to all counties or to all counties in a class. No county shall be exempt from any public general law applicable to counties in its class.

Comment:

This draft section prohibits the General Assembly from enacting public local laws. This would effect a significant change in the present practice of the General Assembly under which, as previously noted, forty to sixty per cent of all legislation considered may be classified as local legislation. The recommendation that the practice of the General Assembly of considering local legislation be discontinued with the adoption of a new constitution is complementary to the Commission's recommendation that the counties be established as the principal units of local government and that they be granted "home rule" powers.

Although the 1864 Constitution of Maryland prohibited the passing of local or special laws on at least eleven distinct subjects, the present Constitution contains no such restriction. The prohibition against consideration of local legislation by the General Assembly should result in the General Assembly's giving more considered attention to the appropriate subjects of statewide concern for which there should be general legislation.

This draft section protects counties from undue interference by the General Assembly by requiring that any withdrawal of powers from the counties be by general legislation which is applicable either to all counties, or to all counties in the same class. The General Assembly is restricted by this provision from eroding the powers of any one particular county.

The Commission believes that the present practice whereby a county exempts itself from a public general law has blurred the distinction between local and general legislation with the result that there is much confusion with regard to the applicability of many public general

laws. Since there is a degree of ineffectiveness of the State's legislative power in this procedure, the Commission recommends that the practice of a county exempting itself from the applicability of a public general law be prohibited.

Section 7.10. Structure of County Governments.

Within one year following adoption of this Constitution, the General Assembly shall provide by law alternative procedures by which an instrument of government of a county may be proposed: by enactment of the local governing body, by petition of ten per cent of the qualified voters of the county, by board created by enactment of the local governing body or created by the voters of the county approving a voters' petition for such a board, or by such other methods as may be prescribed. An instrument of government shall be submitted for adoption by the affirmative vote of a majority of the voters of the county voting thereon. The General Assembly shall provide by law an instrument of government which shall become effective on the first day of January of the fourth year following the effective date of this Constitution for those counties which have not previously adopted an instrument of government as provided in this section.

Comment:

Articles XI-A and XI-F of the present Constitution contain elaborate provisions for the formation of "home rule" and "code home rule" governments for counties. The Commission believes that such detailed and rigid provisions are inappropriate for inclusion in a new constitution and are properly a subject for public general laws. The Commission therefore recommends that the more general language of draft Section 7.10 be adopted to require the General Assembly to enact a law within one year following the adoption of a new constitution setting forth the procedure by which counties may enact an instrument of government. The law enacted must permit the proposal of a structure of county government either by the county governing body enacting a public local law, by petition of the voters of a county, or by a board specifically created either by the existing county governing body or by the voters. In any case, the proposed structure of government must be submitted to the voters for their ratification.

This draft section gives those counties which have not already adopted an instrument of government until the first of January of the fourth year following the effective date of a new constitution to adopt an instrument of government. Failing to act within the prescribed time, a county must accept without ratification the instrument of government which is provided by the General Assembly by public general law, but may at any time thereafter adopt its own instrument of government in the manner prescribed by this draft section. The Commission anticipates that this provision will encourage local initiative by the existing county governing bodies and the voters within each county.

This draft section does not require a county to change its present form of government. On the contrary, a county may elect to continue its present form of government by adopting an instrument of government which does so. All that is required is affirmative action; inaction will put into effect, until changed by the county, the model instrument of government prescribed by the General Assembly.

The draft section leaves to the General Assembly the determination of the procedures for such matters as the election of charter commissions, the publication and ratification of any proposed instrument of government, and the financing of the cost.

Section 7.11. **Continuance of Existing County Governments.**

County governments existing at the effective date of this Constitution shall continue unless changed pursuant to this Constitution.

Comment:

This draft section clarifies the status of those county governments which exist at the time of the adoption of a new state constitution. It provides that existing county governments will continue unchanged until such time as they are changed pursuant to the provisions of the new constitution. The Commission believes that this draft section is desirable to eliminate any uncertainty as to the status of existing county governments in the interim period.

Section 7.12. **Change of Structure of County Government.**

An instrument of government of a county may be amended by the affirmative vote of a majority of the voters of the county voting on an amendment submitted by the governing body or submitted upon petition of voters in accordance with the provisions of the instrument of government.

Comment:

This draft section assures both the governing body and the electorate of a county continued opportunity to initiate changes in the structure of their county government. The Commission recommends that this guarantee be included in a new constitution because it believes that every county instrument of government should be subject to change by the electorate. In addition, in the case where an instrument of government drafted by the General Assembly becomes effective under draft Section 7.10 for a county which has not adopted its own instrument of government by the first day of January of the fourth year following the effective date of a new constitution, the electorate of the county should have an opportunity to alter the structure of government set forth in such instrument of government to their own satisfaction.

CREDIT LIMITATIONS

Section 7.13. **Gift or Loan of Assets or Credit of Local Governments.**

The assets or credit of a county, representative regional government, or intergovernmental authority shall not in any manner be given or loaned to any individual, association, or corporation unless a public purpose will be served thereby and unless authorized by its governing or authorizing body by act stating the public purpose, and in the case of a gift or loan of credit or a loan of assets, passed by the affirmative vote of three-fifths of all its members.

Comment:

Pursuant to the provisions of Article III, Section 54 of the present Constitution, and the Express Powers Act (Article 25A of the Annotated Code of Maryland), a county may not incur any indebtedness without the express authorization of the General Assembly. Such a

restriction is not recommended in the draft constitution. However, the Commission does recommend that credit restrictions identical to those imposed upon the State by draft Section 6.02 be prescribed for counties, representative regional governments, and intergovernmental authorities. Accordingly, this draft section prohibits the assets or credit of a designated local government from being given or loaned to any individual, association, or corporation unless a public purpose is served thereby and unless authorized by the governing or authorizing body of the local government by an act stating the public purpose served by the gift or loan.

This draft section also provides that in the case of either a gift or loan of credit, or a loan of assets, the act authorizing the gift or loan must be passed by the affirmative vote of three-fifths of all of the authorizing body's membership. The Commission believes that the requirement of such a vote is desirable in order to insure against the improvident action of an authorizing body which might underestimate the risk involved in either pledging a government's credit or lending its assets.

The Commission is persuaded of the wisdom of including such a limitation in a new constitution since public funds are appropriately spent only for public purposes, and only pursuant to the official act of a representative body. This restriction is also thought to enhance the credit standing of local governments.[254]

MUNICIPALITIES

Section 7.14. **Municipal Corporations.**

A county may provide by law for the incorporation, change, merger, dissolution and alteration of boundaries of municipal corporations located in the county, and may delegate powers of the county to any municipal corporation. No existing municipal corporation may be dissolved or have withdrawn any existing powers set forth in its charter without either the consent of its governing body or the consent of the General Assembly by law.

Comment:

This draft section complements those on counties by providing that municipal corporations shall continue to be governments of limited jurisdiction within the counties. In order to avoid irresoluble conflicts between the "home rule" counties, with their broad grants of power, and municipal corporations, the Commission believes that counties should be given the power to provide by public local law for the creation, incorporation, and dissolution of any new municipal corporations within their boundaries and for the methods and procedures of changing and merging municipalities and altering their boundaries.

Until 1953, the incorporation of a municipality was an exercise of the State's authority and discretion. Prior to the enactment of Article 23A of the Annotated Code of Maryland, new municipal corporations were created by acts of the General Assembly passed in response to local petition or request. Article 23A removed the process of incorporation to the local level of government, and incorporation now requires local initiative and petition, and the approval of the relevant county governing body before it can become effective.

[254] See comment to draft Section 6.02.

In this way, that portion of the incorporation process which formerly rested with the General Assembly has already been transferred by the provisions of Article 23A to the governing bodies of the several counties. The effect of draft Section 7.14, then, is not so much to change the present procedure as it is to shift from statutory provision to constitutional provision the ultimate responsibility for establishing municipal corporations.

Under the procedure prescribed by the General Assembly for municipal incorporation today, any group of persons may petition for the incorporation of an area if there are at least 300 persons who maintain bona fide residence within the proposed municipal area. The petition must be initiated by at least twenty per cent of those persons who live in the proposed area, and who are registered to vote in county elections, together with the realty owners of at least twenty-five per cent of the total assessed evaluation of the real property in that area. In time, the petition must be presented to the relevant county governing body, which may by resolution provide for a public referendum on the question.[255]

The role of the county in the process of incorporating municipalities is already very significant. Full and final authority has been granted to the county in matters of incorporation in the following terms of the statute:

> "No municipal corporation shall be created under the provisions of this subtitle without the specific approval of the board of county commissioners or of the county council of the county in which the proposed municipal corporation is located."[256]

This provision recognizes the county's contemporary and vital interest in the physical and governmental development of the areas within its boundaries.

The Commission recognizes that certain existing municipal corporations are presently the dominant forces of local government in their respective areas of the State. The Commission, therefore, recommends the inclusion in a new constitution of a grandfather clause to protect the continued existence of those municipal corporations which exist at the time that a new state constitution becomes effective. Such a grandfather clause should be qualified to the extent that with the approval of the municipality's governing body or with the consent of the General Assembly, such existing municipal corporations could be either dissolved or have withdrawn certain of their existing charter powers. This qualification would return to the General Assembly the power of arbiter over conflicts which might arise between a county and an existing municipal corporation and which, because of the county's and the municipal corporation's concurrent power, might otherwise be impossible to resolve.

It should be noted that the existence and status of municipal corporations will not be changed by this draft section except that it will be the county rather than the General Assembly which will incorporate municipalities or provide the laws by which municipalities will be incorporated; and it will be the county rather than the General Assembly which will be the source of the powers of municipalities.

[255] ANNOTATED CODE OF MARYLAND article 23A, sections 20-30 (1957).

[256] ANNOTATED CODE OF MARYLAND article 23A, section 21 (1966 Replacement Volume).

COOPERATIVE AGREEMENTS

Section 7.15. **Intrastate Intergovernmental Agreements.**

A county, municipal corporation or other governmental unit may, except to the extent prohibited by law, agree with the State or with any other county, municipal corporation or governmental unit for the joint administration of any functions and powers and the sharing of the costs thereof.

Comment:

This draft section ensures that there are no obstacles arising from the constitution to cooperation between the State and its civil divisions, or between the civil divisions themselves in the performance of joint functions. The Commission believes that the adoption of this draft section will encourage intrastate cooperation. With the continued growth of inter-community needs and problems in the metropolitan age, cooperation among local governments has greatly increased in efforts to meet the challenges of adequate services and facilities.

Intergovernmental agreements are agreements under which a governmental unit conducts an activity jointly or cooperatively with one or more other governmental units, or contracts for its performance by another governmental unit. The agreement may be permanent or temporary; pursuant to special acts or general law; effective with or without voter approval; and may be formal or informal in character. Intergovernmental agreements may be for the provision of direct services to citizens of two or more jurisdictions, such as water supply or police protection; or they may be for governmental housekeeping activities, such as joint purchasing or personnel administration activities.

Adherents of intergovernmental agreements are primarily attracted to this cooperative device because it provides a process for dealing with needs and problems on a voluntary basis and affords a means of retaining local determination and control. The most vigorous opponents of this cooperative device consider it to be a weak palliative that is incapable of handling the total major area-wide difficulties of the metropolis.

In general, cooperative agreements are negotiated by administrators of the respective local governments and can go into effect after their governing bodies pass the necessary ordinances and resolutions. In contrast, alternative approaches generally become operative only after they have surmounted the often difficult hurdles of obtaining the sanction of the local voters. Unquestionably, cooperative agreements, often accomplished without public awareness that they exist, are subject to a much easier adoption procedure.

In terms of its local use in metropolitan areas, the cooperative method embraces an exceedingly broad sweep of local services and facilities and involves every level of local government. Some of the important functions include airports, building inspection, civil defense, construction and operation of public buildings (including not only the headquarters of governments, but also auditoriums, hospitals, libraries, memorials, and stadiums), correctional and detention facilities, election services, fire protection, flood control, public health activities, and hospital services. Others include law enforcement, library services, parks and recreation, personal services, planning, purchasing, refuse disposal, road construction and maintenance, sewage disposal and treatment,

tax assessment and collection, public welfare activities, and water supply.

Most cooperative agreements are between two governments and concern a single activity, and they usually pertain to services rather than facilities. Such agreements are not necessarily permanent. The Philadelphia, Cleveland, St. Louis and Los Angeles areas and the State of California provide good illustrations of the use of intergovernmental agreements.[257]

[257] BOLLENS & SCHMANDT, THE METROPOLIS: ITS PEOPLE, POLITICS AND ECONOMIC LIFE 379 (1965).

ARTICLE VIII. GENERAL PROVISIONS

Introductory Comment:

This draft article contains eight sections dealing with five diverse and unrelated subjects. It is believed that this arrangement is preferable to the inclusion in the constitution of a number of separate articles consisting of only one or two relatively short sections.

The subjects dealt with in this draft article are taxation, education, the militia, interstate intergovernmental cooperation and public officers. The Commission's recommendations with respect to each of these matters is set forth in the eight draft sections of this article and the commentary with respect to each of them, and it will not be necessary to summarize those recommendations here. However, there are some general provisions included in the present Constitution which the Commission recommends be omitted from a new constitution; and the Commission's recommendations with respect to these provisions are set forth here.

TAXATION

Article 15 of the present Declaration of Rights provides in part as follows: "That the levying of taxes by the poll is grievous and oppressive, and ought to be prohibited; that paupers ought not to be assessed for the support of the government; . . ." These two clauses date back to the Constitution of 1776, but the first clause was amended in 1864 when the word "prohibited" was substituted for the word "abolished."[258]

The tax by the "poll," or head, was at one time the only direct tax in Maryland. In a slave-holding era such taxes probably bore some rough relation to ability to pay, inasmuch as slaves were taxed by the head and their owner required to pay the tax. The historical opposition to the poll tax apparently stems from its imposition on Maryland dissenters for the support of the Church of England. It is noteworthy that no prohibition against the poll tax appeared in the constitutions adopted in the neighboring states of Delaware, Pennsylvania and Virginia, where the poll tax was not used for the support of the church. Efforts to repeal the prohibition in the constitutional conventions of 1850, 1864 and 1867 failed, probably because of the association of the poll tax with the right to vote. A proposed amendment to Article 15, which included repeal of the poll tax provision, was submitted to the people at a referendum in 1890, but was defeated.

The Commission does not think it necessary to continue in a new constitution a prohibition of the poll tax. In holding payment of poll taxes as a voting requirement unconstitutional, the United States Supreme Court said nothing to impair the legality of the poll tax as such "so long as it is not made a condition to the exercise of the franchise.[259] Stripped of its applicability to voting

[258] Much of the historical analysis of the provisions of the present Declaration of Rights and Constitution dealing with taxes contained in the commentary to Article VIII of the draft constitution is drawn from the excellent work of H. H. Walker Lewis, "The Tax Articles of the Maryland Declaration of Rights," 13 MD. L. REV. 83 (1953), and from a memorandum prepared at the request of the Commission by Mr. Lewis which brings his article to date and which will be published in a subsequent issue of the Maryland Law Review.

[259] Harper v. Virginia Board of Elections, 383 U. S. 663, 669 (1966).

rights, the Commission sees no objection to such a capitation tax if it meets the test of uniformity required by draft Section 8.02, and the "due process of law" and "equal protection of the laws" requirements of draft Section 1.04.

In colonial Maryland all persons who received public alms were considered paupers and exempted from taxation. An act of the General Assembly in 1781 exempted from all taxation persons "whose property shall not be valued above 10 pounds current money." Pauperism is no longer defined by the General Assembly; it is arguable, however, that the general exemptions from taxation of small holdings which do currently appear in the taxing statutes are an outgrowth of the pauper exemption. Whether or not such exemptions are required by the second clause of Article 15 of the present Declaration of Rights is open to question. In any event, this clause has significance for historical reasons only and it has no modern meaning or effect. The Commission, therefore, recommends that it be omitted from a new constitution.

The concluding clause of Article 15 of the present Declaration of Rights provides that, "fines, duties or taxes may properly and justly be imposed or levied with a political view for the good government and benefit of the community."

The "political view" clause has been in every Maryland constitution in substantially the same form. To the extent that it authorizes the levying of taxes, it is redundant since the General Assembly has plenary legislative power; and no specific authorization of the taxing power is necessary in a state constitution. Notwithstanding this fact, some cases have referred to the clause (mistakenly, it is submitted) as the constitutional basis of indirect, non-property taxes, such as license taxes, inheritance taxes and income taxes.[260] It has also been suggested that such indirect taxes as are "authorized" by the "political view" clause are not subject to the uniformity and equality principle inherent in the preceding clauses of Article 15 of the present Declaration.[261] Another rather antiquarian reading of the "political view" clause is that it may justify the exaction of taxes not strictly speaking for the support of the government, but nevertheless for the good of the community.[262]

The Commission believes that the essential meaning of the "political view" clause has been given expression in the first clause of draft Section 8.01. The Commission, therefore, recommends that the "political view" clause of the present Constitution be omitted from the new constitution.

THE LOTTERY

Article III, Section 36 of the present Constitution reads as follows:

> "No Lottery grant shall ever hereafter be authorized by the General Assembly."

This prohibition first appeared in the Constitution of 1851. It will be noted that it prohibits *future* lottery grants. It was not until 1860 that the General Assembly finally abolished all lotteries then existing within the State. Prior to that time various forms of lottery were used to a very substantial extent to help fi-

[260] See, *e.g.*, Oursler v. Tawes, 178, Md. 471, 485-86 (1940).

[261] NILES, MARYLAND CONSTITUTIONAL LAW 32-33 (1915).

[262] See, *e.g.*, Waters v. State, 1 Gill 302 (1843), upholding on this theory a tax for the financing of the colonization of free Negroes in Africa.

nance some of the more venerable of the Maryland institutions.

A Board of Lottery Commissioners was established in 1818 to supervise and tax all lottery grants in the State. According to a list published by the Commissioners of Lotteries in 1818, lottery schemes had helped raise funds for the construction of the churches and cathedrals of a number of different faiths, as well as for hospitals, monuments, roads, libraries and schools. It has been estimated that from 1791 to 1800 approximately 180 lottery grants and their extensions produced some 3,200 lotteries in Baltimore City alone, attracting $180,000,000, of which $120,000,000 was returned as prize money and $60,000,000 was divided among the promoters, the State and the intended specific beneficiaries of the lottery schemes.

In practice, the schemes did not raise funds either quickly or easily for the intended projects. In order that the Maryland lotteries be competitive with lotteries in other states, it was often necessary to return in prize money most of the money collected, with only a small percentage being retained for the construction project to be assisted. Thus, many extensions of lottery authorizations were essential before the intended projects were completed. By the 1830's substantial sentiment existed for the curbing, and eventual abolition, of the lottery grants on the grounds that they were a slow and uneconomical system for the raising of funds for public and quasi-public projects, that they created pauperism, and that they were marked by mismanagement and even corruption on the part of the commissioners.[263]

It was suggested to the Commission by proponents of lotteries that the constitutional prohibition against "lottery grants" might be construed to bar only grants by the General Assembly of authority to private corporations or individuals to operate a lottery, but not to prevent the institution of a state-operated lottery. However, Attorney General Herbert R. O'Conor in 1935, in an official opinion,[264] expressed the contrary opinion and ruled unconstitutional a bill which would have authorized the operation by the State of a sweepstakes on horse racing in Maryland.

The Commission invited testimony and statements from all persons interested in expressing their views as to whether a lottery should be prohibited by a new constitution. The Comptroller of the City of Baltimore, the principal advocate in Maryland of a state-operated lottery, urged abolition of the existing constitutional prohibition of lotteries on the grounds that it is inconsistent to bar lotteries but not parimutuel betting at race tracks; that a state-operated lottery would take from organized crime a major source of revenue, namely the numbers racket; that a state-operated lottery would raise money for sound public purposes; and that most citizens favor a state-operated lottery and their will should not be thwarted.

Statements presented on behalf of the Episcopal Diocese of Maryland and the Baptist Convention of Maryland favored retention in the constitution of the present prohibition of lotteries on the grounds that a lottery is immoral, corrupts the young by its sanction of "easy money," would be an admission that our taxpayers would not support their government, and would "open the flood

[263] Baltimore Criminal Justice Commission, Report on Legalized Gambling 3-7, 23-25 (1964).

[264] 20 Ops. Md. Atty. Gen. 266 (1935).

gates of crime." These opponents of a lottery also contended that gambling is a destructive, parasitic force in society and said that the lottery would bring in its wake crime and poverty. The statement presented on behalf of the Roman Catholic Archdiocese of Maryland and concurred in by Cardinal Shehan expressed no opinion on the merits of a state-operated lottery, but suggested that the question was properly one for legislative determination, and "not the type of subject matter which should be included in a state constitution."

The Commission recommends that the new constitution not contain any prohibition of a lottery.

In making this recommendation the Commission in no way wants to be understood as favoring the adoption of a state-operated lottery or any other form of gambling device for the alleged purpose of raising revenue for the State. Instead, the Commission's recommendation is based on its conviction that the issue is not one of such dimension as should be treated in the State's organic law. Although impressed with the persuasive arguments against the wisdom of a state-operated lottery, the Commission feels that these arguments should be addressed to the elected legislative representatives of the people. The Commission is aware of the fact that the constitutions of at least thirty-five other states either bar or sharply restrict lottery operations.[265] Nevertheless, the Commission believes that as important and far reaching as the lottery question may be, it is not of that fundamental character which justifies its inclusion in a state constitution.

Section 8.01. **Taxes.**

No tax shall be imposed except for a public purpose and except by the elected representatives of the people exercising legislative powers.

Comment:

This draft section incorporates the principle of "no taxation without representation" which had been expressed, for Englishmen, in the British Bill of Rights of 1689 and, for American colonists, in the Declaration of the Stamp Act Congress of 1765. The principle is stated in Article 14 of the present Declaration of Rights as follows:

> "That no aid, charge, tax, burthen or fees ought to be rated or levied, under any pretence, without the consent of the Legislature."

This provision appeared in identical language in the Declarations of Rights of 1851 and of 1864, and in substantially the same language in the Declaration of Rights of 1776.[266]

The purpose of this draft section is to prevent the imposition of taxes without the consent of the elected representatives of the people. Delegations of the taxing authority to local subdivisions have been held proper,[267] but in some instances the principle appears to have been eroded through the delegation by the General Assembly of taxing authority to nonelected administrative boards.

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[265] INDEX DIGEST 487.

[266] MARYLAND CONSTITUTION article XII (1776); MARYLAND CONSTITUTION article 12 (1851); MARYLAND CONSTITUTION article 14 (1864).

[267] Alexander v. Mayor and City Council of Baltimore, 5 Gill 383 (1847); Burgess v. Pue, 2 Gill 11 (1844).

Such a delegation, in unusual circumstances, has been upheld.[268]

The Commission believes that the historic principle of "no taxation without representation" has important modern significance in requiring that the consent of the elected representatives of the people be required before taxes of any kind can be imposed.

The Commission also recommends inclusion in this draft section of a public purpose limitation on the imposition of all taxes. The Commission believes that the public purpose test distills and gives effect to the meaning of the "political view" clause of Article 15 of the present Declaration of Rights.

Section 8.02. **Assessments.**

No assessment nor any exemption therefrom with respect to any tax imposed by the State or any governmental unit thereof shall be made except pursuant to uniform rules within classes or subclasses of taxpayers, property or events as may be provided by law and such classes or subclasses may include property devoted to agricultural or open-space uses.

Comment:

The Commission believes that no constitutional mandate is or ought to be necessary in order to confer on a legislative body the power to tax, to assess property, to make reasonable exemptions from taxation or to make reasonable classifications of property necessary to a proper exercise of the taxing power. The Commission believes, however, that it is a proper function of the constitution to place such restrictions on the exercise of the taxing power as are necessary to safeguard the rights of all Maryland citizens. With respect to taxation, it is the right of the citizen to be treated uniformly with other citizens similarly situated. Indeed, it might be postulated that this is a natural right which must be protected in all events from governmental encroachment.

It is for this reason that protection from discriminatory tax practices found its way into the Declaration of Rights. In Article 13 of the 1776 Declaration of Rights the clause immediately following the pauper exemption provided that:

> "[E]very other person in the State ought to contribute his proportion of public taxes, for the support of government, according to his actual worth, in real or personal property, within the State; . . . ."

This provision strongly reflected the principle of "contribution according to worth" enunciated in the same year by Adam Smith in his "Inquiry Into the Nature and Causes of the Wealth of Nations."

This clause has been amended three times. It was changed slightly in the 1851 Declaration of Rights to make it clear that nonresidents owning property in this State could be required to contribute to the support of the government and that the measure of worth was not restricted to property within the borders of the State. As thus amended, the clause was continued in the Declaration of Rights of 1864 and of 1867, but was amended in 1915 to strike out the requirement for the apportionment of

[268] Baltimore v. State, 15 Md. 376 (1860), where the Court upheld a legislative grant of authority to a state board of police commissioners, appointed to bring to a halt widespread lawlessness and corruption in Baltimore City, to determine its own expenditures and to require the City to pay them.

taxes according to actual worth and to substitute the requirement for uniformity in assessment and taxation of land within the taxing district, of improvements on land and of personal property within the classification.[269] Another amendment adopted in 1960 brought the clause to its present form in Article 15 of the Declaration of Rights by permitting the classification of land for tax purposes.[270] As part of this amendment, Article 43 of the present Declaration of Rights was also amended; both amendments were intrinsically bound up with the farmland assessment question.

Of these three amendments to Article 15, by far the most significant was the classification and uniformity amendment of 1915.[271]

Article 15 of the present Declaration of Rights has been interpreted by the courts to guarantee to the citizens equal and even-handed treatment in matters of property taxation.[272] This concept should be strengthened and broadened into other fields of taxation, particularly in view of the fact that in a modern society it is the excise tax, and not the property tax, which produces the greatest revenue.

Uniformity in taxation does not imply universality. The solution of the problem lies in proper classification. So long as proper classes are maintained, the test of uniformity will be met if all members of the class are treated alike. For these reasons, this draft section requires that classifications be established by law before a tax may be imposed. Since taxation depends upon the trilogy of the taxpayer, the taxpayer's property and the relationship of the taxpayer to the property—an "event"—this draft section recommends that the taxation process be accomplished within these concepts.

It should be emphasized that the concept of proper classification should not be restricted solely to the property tax, although Article 15 of the present Declaration points in this direction. For example, it has been suggested that indirect taxes are not within the purview of direct taxation.[273] This decision has caused a belief by some commentators that the income tax is not subject to Article 15 of the present Declaration and that the uniformity and equality provisions of Article 15 are therefore inapplicable to the income tax.[274]

In common parlance, the word "assessment" as applied to taxation is used almost entirely to mean official valuation for purposes of determining the amount of an *ad valorem* tax. It should be noted, however, that in this draft section the word "assessment" is used in its broader sense and therefore includes not only valuation of property for *ad valorem* tax purposes, but the imposition or levy of a tax, or the determination of the rate or amount of a tax. The requirements of this draft section are, therefore, clearly applicable not only to

[269] Acts of 1914, chapter 390, ratified Nov. 2, 1915.

[270] Acts of 1960, chapter 64, ratified Nov. 8, 1960.

[271] See Lewis, "The Tax Articles of the Maryland Declaration of Rights," 13 Md. L. Rev. 83 (1953), for a very interesting and informative discussion of the causes and effects of the 1915 amendment.

[272] National Can Corp. v. State Tax Comm'n, 220 Md. 418 (1959); State Tax Comm'n v. Gales, 222 Md. 543 (1960).

[273] State v. P., W. & B. R.R., 45 Md. 361, 378 (1876).

[274] Cairns, "History and Constitutionality of the Maryland Income Tax Law," 2 Md. L. Rev. 1 (1937).

property taxes, but to indirect and excise taxes of every kind.

Uniform treatment in matters of taxation does not, however, depend solely on proper classification. Classification properly made is but the first step. The necessary corollary is that each class or subclass which defines the incidents of taxation must be treated by uniform rules. Thus, the objective standards that fix the tax burden must be equally applied to each incident of a similar nature. This draft section recognizes this necessity by requiring that all assessments and exemptions within a recognized class shall be made "pursuant to uniform rules."

The direct burden of any tax is imposed through the process of assessment, whether the tax be direct or indirect. The hidden burden of taxation, however, is derived not from what the individual taxpayer must pay by reason of his assessment but, rather, by what his neighbor does not pay because of his underassessment. The concept is, in the last analysis, one of distribution. If the common government requires a certain sum to operate, the entire citizenry must pay the bill. An underassessment requires a shifting of the burden which may or may not be fair, depending upon the method by which the burden is distributed.

The most common cause of underassessment in the broad, generic sense is the exemption from taxation. Exemptions are of many kinds and are the product of many motives—social, economic, political. Exemptions from tax may, therefore, be justified on sound grounds; they may also be subject to strong criticism. The Commission believes that all exemptions, like all assessments, should be made uniformly throughout the State. To this end, the Commission recommends and this draft section requires that exemption from tax shall also be made pursuant to "uniform rules." There is no comparable provision in the present Constitution, but this recommendation has found favor with all state tax administrators with whom the Commission consulted.

This draft section is intended to place the concepts of uniform and fair tax practice in the constitution in a broad and meaningful manner. It will apply to all taxes and to all exemptions from taxes. In addition, it should be noted that this draft section applies to every legislative body in Maryland that imposes a tax.

This draft section specifically permits the separate classification of "property devoted to agricultural or open-space uses." It is recognized that specific reference to this special form of classification is not essential to confer upon the General Assembly the power so to classify. The Commission believes, however, that in view of the very recent adoption[275] by an overwhelming vote of the amendments to Articles 15 and 43 of the present Declaration of Rights to provide for a special method of assessing land devoted to farm or agricultural uses, an explicit sanction of a classification of property devoted to agricultural use would be an appropriate expression of the public policy of the State.

It should be noted, however, that the language of this draft section, "property devoted to agricultural or open-space uses," is broader than the language of Article 43 of the present Declaration of Rights, "land actively devoted to farm or agricultural use." The Commission

[275] Acts of 1960, chapters 64 and 65, ratified Nov. 8, 1960.

believes that this draft section will give the General Assembly greater latitude in dealing with the problem of assessing fairly and equitably for tax purposes land which is and should be retained as essentially rural or open-space land, although located in close proximity to land in highly developed suburban or urbanized areas. This also gives the General Assembly the power to take appropriate steps to encourage "open-space" uses of land where this is desirable.

Section 8.03. **Public Education.**

The State shall provide by law for a statewide system of free public schools sufficient for the education of, and open to, all children of school age, and shall also provide for such other public educational institutions as may be desirable for the intellectual, cultural and occupational development of the people of this State.

Comment:

The provisions with respect to education in the present Constitution are those contained in the three sections of Article VIII of the Constitution and in the first portion of Article 43 of the Declaration of Rights. Their predecessors were the six sections of Article VIII which first appeared in the Constitution of 1864. Article VIII, Section 2 of the present Constitution, which deals with the system of public schools as constituted at the time the Constitution of 1867 became effective, is no longer operative, but the remaining two sections of Article VIII of the present Constitution and the portion of Article 43 of the Declaration of Rights dealing with education, are still in effect and have never been amended.

Article VIII, Section 1 of the present Constitution requires the General Assembly to "establish throughout the State a thorough and efficient System of Free Public Schools" and provide for their maintenance by taxes or otherwise; Section 3 provides that "the School Fund of the State shall be kept inviolate, and appropriated only to the purposes of Education." In relevant part, Article 43 of the Declaration of Rights declares that the legislature "ought to encourage the diffusion of knowledge and virtue, the extension of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures, and the general melioration of the condition of the People."

Unlike the Constitution of 1864, the present Constitution does not provide for boards of education, superintendents of schools or any of the other matters necessary for the administration of a school system. These details are all left for the determination of the General Assembly with the result that the entire public school system in Maryland is today dependent upon statutory authority for its creation, existence, maintenance and financial support. The only other provisions of the present Constitution dealing with education are those contained in the budgetary provisions of Article III, Section 52.[276]

In this draft section, the Commission recommends retaining the essential parts of Article VIII, Section 1 of the present Constitution and the relevant part of Article 43 of the Declaration of Rights, but believes that this draft section has

[276] These essential budgetary provisions are continued in draft Sections 6.05 and 6.07. See the commentary to those draft sections.

stated these concepts and requirements in clearer, simpler and yet more explicit and meaningful language. The mandate of this draft section is also broader in scope in that it requires the General Assembly not merely to establish a system of public schools, but to establish "a state-wide system of free schools sufficient for the education of, and open to, all children of school age. . . ." This leaves for the determination of the General Assembly the precise limits of "school age"; and clearly authorizes, but does not require, the General Assembly to provide for kindergarten and nursery schools. At the same time, the last clause of this draft section authorizes, but does not require, the General Assembly to provide for post-secondary school education and adult, vocational and other special forms of education as may be desirable.

Some persons appearing before the Commission advocated constitutional definition of "free public schools" as including colleges. The Commission believes, however, that the extent to which college and post-graduate education shall be encouraged or subsidized, or provided entirely at the expense of the State, is a matter which should be left to the determination of the General Assembly.

The Commission believes that this draft section emphasizes the necessity for an adequate statewide system of free public schools and the overall importance of public education at every level.

The Commission does not believe that any good purpose would be served by the retention of a provision that the "School Fund" of the State shall be kept inviolate. As used originally in the Constitution of 1864, the "free public-school fund" was a fund of $6,000,000 derived initially from property taxes. The principal of the fund thereby created was declared to be inviolate; and the interest on the fund was to be used for education purposes only. There is no such separate "School Fund" today and this term in Article VIII, Section 3 of the present Constitution means any monies received by the local school authorities from the local subdivisions. These funds can only be used for purposes of education and any expenditure by a local school board may be challenged as not being for an educational purpose. Only to this extent does Article VIII, Section 3 of the present Constitution have any application today.[277]

School funds as they exist today are essentially local funds, rather than state funds and no separate or identifiable "School Fund" now exists. In addition, the Commission believes that the existing provision does not actually give any real protection to the integrity of the monies appropriated for public school purposes. At the state level, all such appropriations are included in the budget. To a large extent, they are based upon the requirements of a statute and the estimates of public school officials as to the amount of money needed to meet these requirements. More often than not, the requirements are over-estimated with the result that at the end of each fiscal year there remains an unexpended balance of the appropriation in the budget for public schools. This balance does not continue in existence as a school fund of any kind, but instead, under the budgetary provisions of Article III, Section 52 of the present Constitution, it reverts to the state treasury as a general surplus, which may be utilized in a supplemental

[277] Board of Education v. Wheat, 174 Md. 314 (1938).

budget, or in the budget for the next fiscal year, for any purpose. It is not in any way limited to use for school purposes. The Commission believes that full and adequate protection of the school fund is provided by draft Sections 6.05 and 6.07.[278]

Some persons testifying before the Commission urged that a state board of education and a state superintendent of schools be given constitutional recognition, as was done in the Constitution of 1864 and is done in some other states.[279]

As noted above, a state board of education and a state superintendent of schools are now provided for by statute, and the Commission is reluctant to recommend a change in the status of what appears to be an extremely well-run organization, free from political influence. Proponents of constitutional recognition of a state board of education and a state superintendent of schools argue that such recognition would ensure against future political domination of the school system, but the Commission believes that constitutional sanction does not necessarily give greater protection against political interference. For instance, the Constitution of Hawaii originally provided for a state superintendent of schools, but by constitutional amendment the state superintendent of schools in Hawaii is now elected, a result which the Commission believes would be most unfortunate in Maryland.

It will be noted that the draft section does not include any language which would either prohibit or require public aid to private educational institutions. The Commission believes that this is a matter to be decided by the General Assembly, as it sees fit within the constitutionally prescribed limits.

It has been the long established practice of the General Assembly, beginning as early as 1784, to give aid to private institutions of all kinds which are performing the same services as public institutions, such as colleges, hospitals and welfare institutions. The Commission does not think that this is an improper use of public funds which should be restricted or prohibited, except to the extent that other constitutional requirements restrict or inhibit such use.[280] On the other hand, there has been no explicit constitutional sanction for the practice of granting state aid to private institutions during a period of nearly two hundred years, and the Commission does not believe that any explicit constitutional sanction is needed now.

Some members of the Commission, however, expressed the fear that because this draft section refers only to public education, it may be implied that state aid to private education is forbidden. They suggested that this draft section be amended so that the clause requiring the General Assembly to provide for such other public educational institutions as may be desirable be changed to require the General Assembly to "provide for or aid such other educational institutions as may be desirable." Most of the members of the Commission believed that this change was unnecessary

[278] See the commentary to those draft sections.

[279] Phay, "The Board of Trustees of the University of North Carolina: A Comparison with Other Governing Boards," 9-16 *Popular Government* (May 1966).

[280] As for example, draft Section 1.03 and the "establishment of religion" clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment. See Horace Mann v. Board of Public Works, 242 Md. 645, *cert. denied,* 385 U. S. 97 (1966).

and they pointed to the fact that without any express sanction in the present Constitution, state aid to private nonsectarian educational institutions had been held valid and constitutional.[281]

The Commission, however, desires to make it abundantly clear that nothing contained in or omitted from the language of this draft section is intended to prohibit, restrict or limit the use of public monies to aid private educational facilities. This draft section is intended to deal only with public education. The General Assembly has plenary legislative power under draft Section 3.01 and any limitation on its authority to appropriate public monies for the aid of private education would flow from other constitutional restrictions and not from this draft section.

Section 8.04. **Higher Education.**

The University of Maryland shall be managed by the regents of the University of Maryland in accordance with law, and the regents shall have exclusive general supervision of the institution and the control and direction of all expenditures from the institution's funds. The governing boards of the state colleges and other state institutions of higher education shall formulate policies for their respective institutions and shall by law be granted such additional powers of supervision, direction and control of their respective institutions and institutional funds as may be feasible and consistent with their status as public agencies.

Comment:

The first sentence of this draft section grants what has been termed "constitutional autonomy" to the University of Maryland. This matter was the subject of extensive hearings by the Commission's Committee on Miscellaneous Provisions, which also had extensive correspondence and both formal and informal discussions of the subject with leading educators in the State. The question was also the subject of prolonged discussion and debate in the formal sessions of the Commission.

The discussion of "constitutional autonomy" for the University of Maryland was initiated by a letter to the Committee on Miscellaneous Provisions from Dr. Wilson H. Elkins, President of the University. This was followed by extensive correspondence between Dr. Elkins and the Committee and other members of the Commission, and by a personal appearance of Dr. Elkins before the Committee. In addition, the Committee solicited and received the views and statements of position of other educators, and in particular those of the Advisory Council on Higher Education and the Board of Trustees of State Colleges.[282]

In its initial report to the Commission dealing with this subject matter, the Committee on Miscellaneous Provisions proposed for inclusion in a new constitution a section designating the University of Maryland as the state university, granting autonomy to its Board of Regents and providing for a Board of Regents to be appointed by the governor. The proposed section was discussed by

[281] See Johns Hopkins University v. Williams, 199 Md. 382 (1952).

[282] This correspondence and testimony, and these statements of position, will be included in Volumes II and IV of the papers of the Maryland Constitutional Convention Commission (in Enoch Pratt Library, University of Maryland Library, Maryland State Library, Johns Hopkins University Library).

the Commission, but referred back to the Committee for further consideration. In its subsequent report to the Commission, the Committee on Miscellaneous Provisions proposed for inclusion in a new constitution a section consisting of the first sentence of this draft section.

After very extensive debate, the Commission rejected the proposal of the Committee on Miscellaneous Provisions by a vote of 11 to 10 and then referred the matter back to the Committee to draft for further consideration of the Commission a provision granting to the University of Maryland something less than the complete autonomy previously recommended by the Committee and rejected by the Commission.

Pursuant to this direction, the Committee on Miscellaneous Provisions presented to the Commission at its next meeting, held some ten days later, three alternate provisions which the Committee believed would provide something less than complete autonomy to the University of Maryland. The Committee, however, recommended none of these provisions and, instead, again recommended to the full Commission that it adopt the provision granting complete autonomy to the University of Maryland theretofore recommended by the Committee.

On reconsideration, the Commission, by a vote of 13 to 11, reversed its previous action rejecting the proposal of the Committee. Then, by a vote of 20 to 4, the Committee's proposal was amended to read as set forth in this draft section. After further discussion, the following substitute was proposed and, by a vote of 11 to 10, was rejected:

> "The governing boards provided by law for the University of Maryland and for state institutions of higher learning shall formulate policies for their respective institutions and shall have general supervision thereof in all academic matters. They shall by law be granted such additional powers of supervision, direction and control of their respective institutions and the expenditure of the funds thereof as may be feasible and consistent with their status as public agencies."

Throughout the debate and discussion of this matter, the members of the Commission were generally agreed that the University of Maryland, the state colleges and other public institutions of higher education should have autonomy in all academic matters, and were also generally agreed that the state colleges under the Board of State Colleges and the community colleges under the Board of Education should not be granted so-called "constitutional autonomy." Finally, the members of the Commission were also in general agreement that the Regents of the University of Maryland should not only have full control of the institution in all academic matters, but that they should also have control over the general supervision of the institution and control over the expenditure of its funds. In other words, the members of the Commission were generally in agreement on the proposition that the University of Maryland ought to have "autonomy" not only in academic matters, but in fiscal matters. The divergency of opinion among the members of the Commission was over the question of whether this "autonomy" should be granted by statute and, therefore, be subject to change by the General Assembly; or should be granted by the Constitution and, therefore, not be subject to change by the General Assembly.

The University of Maryland has been in existence in some form since 1807, and since 1812 its governing authority has been the Board of Regents.[283] It is a land-grant institution, and is the State's only public university and is one of the ten largest universities in the nation. The University has had a degree of statutory autonomy since the passage of the so-called "Autonomy Act"[284] in 1952 which conferred on the Board of Regents the power to manage the affairs of the University with certain exceptions. In 1964 the Autonomy Act was amended to require that in branch facilities of the University, nonacademic personnel be under the rules and regulations of the state personnel department and purchases made by such branch facilities be "subject to the authority of the Central Purchasing Bureau."[285] This provision has now apparently been superseded by a statute enacted in 1967, restoring to the Board of Regents full autonomy as to the Baltimore County branch.[286]

All of the nation's leading public universities do not enjoy constitutional autonomy, but the University of California, the University of Michigan and the University of Minnesota do.[287] Approximately half of the states recognize the state university in their constitutions[288] and in some new or recently revised constitutions, constitutional autonomy for state universities has been granted or expanded.[289] Many state universities enjoy varying degrees of autonomy granted by statute, which is, therefore, subject to the control of the legislature.[290]

Those favoring "constitutional autonomy" for the University of Maryland suggest that the starting point for any great state university is autonomy of management consistent with, and properly balanced against, the need for supervision by public authorities. These proponents emphasize that even under "constitutional autonomy" the General Assembly will have the final authority to determine how much will be appropriated each year for the University. They contend that while the necessary autonomy can be provided by statute, it can also be eroded by subsequent legislation. This has happened in Maryland and in other states. The proponents of "constitutional autonomy" further point out that the early land-grant colleges, of which the University of Maryland is one, have been traditionally autonomous; and that "the complex bureaucratic organization resulting from the vast expansion of state government has become a discordant intrusion upon the desired and established independence of these educational institutions."

[283] Acts of 1812, chapter 159; see also Acts of 1920, chapter 480.

[284] Now codified as ANNOTATED CODE OF MARYLAND article 77, section 249(e) (1965 Replacement Volume).

[285] ANNOTATED CODE OF MARYLAND article 77, section 251A (1965 Replacement Volume).

[286] Acts of 1967, chapter 674.

[287] INDEX DIGEST 406; MINNESOTA CONSTITUTION article VIII, section 4.

[288] INDEX DIGEST 405-08.

[289] ALASKA CONSTITUTION article VII, sections 2, 3; GEORGIA CONSTITUTION article VIII, section 4; HAWAII CONSTITUTION article IX, sections 4, 5; MICHIGAN CONSTITUTION article VIII, sections 4, 5; MISSOURI CONSTITUTION article IX, section 9. See also: Phay, "The Board of Trustees of the University of North Carolina: A Comparison with Other Governing Boards," *Popular Government* (May 1966).

[290] See MOOS & ROURKE, THE CAMPUS AND THE STATE (1959); THE REPORT OF THE COMMISSION FOR THE EXPANSION OF PUBLIC HIGHER EDUCATION IN MARYLAND 45 (June 1962).

The proponents of "constitutional autonomy" say that under "statutory autonomy" the University of Maryland has grown in size until it is one of the ten largest universities in the United States, that it has become fully accredited by its regional accrediting association and numerous professional associations, that it has been invited to establish a chapter of Phi Beta Kappa, that the faculty has attained distinction in many fields as a result of which the University has become engaged in very substantial research programs sponsored principally by the federal government, and that, in addition, the University is the principal research agency of the State. This research activity, which is an integral part of the graduate program of the University, is growing rapidly.

The position of the University in requesting "constitutional autonomy" is summarized in the following excerpt from a letter from Dr. Elkins to the Commission:

> "Constitutional recognition will further enhance the reputation of the University and provide security for the future. In asking for this, the University does not seek independence from the legislature or the executive branch of the government, but it does plead for the power of internal management. It does not seek to be independent of the Budget Bureau of the State in justifying funds from the State, but it should be independent of the Budget Bureau in the management of those funds. If the University did not have the power to purchase equipment and employ personnel without going through other agencies, it would not be in a position to carry on its vast and highly specialized research and service activities.
>
> "In summary, the University of Maryland presents a special case for constitutional recognition. Its comprehensive nature, complexity, size, unique function, and its experience with statutory autonomy places it in a position which is strikingly different from all other institutions in the State. Statutory autonomy can be eroded and has been in the past. In many and often devious ways, it is under attack continually. A simple provision in the constitution, giving power of management to the Board of Regents, will substantially strengthen the University of Maryland in the decisive years ahead."

Those not favoring "constitutional autonomy" for the University of Maryland point out that the University of Maryland is not an agency of government which should be provided for in the constitution, that no other agency of the State has autonomy under the constitution, that the entire system of public education is a creature of statute and the State Board of Education which administers it at the state level does not have constitutional status, that the University is a public institution supported by taxation and should be subject to the final authority of the General Assembly, and that the General Assembly and not the University should have the ultimate authority in prescribing the tuition and other fees payable by students at the University. It is further suggested that although the General Assembly would, under this draft section, have control over the total amount of public money appropriated to the University, it would have no control whatsoever over the uses of such monies as might be appropriated to the University.

The Board of Trustees of State Colleges very strongly urged the Commis-

sion to recommend also that the new constitution establish autonomy for the governing boards of all institutions of higher education, including the Board of Trustees of State Colleges.

The Commission is impressed by the rapid development in quality and quantity of the State's other higher educational facilities, including the five state colleges presently under the supervision of the Board of Trustees of State Colleges, Morgan State College which is now independent but contemplated for inclusion under the supervision of the Board of State Colleges,[291] and the community colleges which are now under the supervision of the Board of Education. The Commission is also concerned that all of these institutions of higher education be given maximum opportunity for unfettered development. However, the present system of state colleges and community colleges is relatively new and the Commission thinks that it would be unwise to establish permanently in the constitution a system of government for these colleges which is still in a state of development.

For these reasons, the Commission recommends that the constitution grant autonomy in academic matters to the governing boards of other public institutions of higher education and recognize the need of such governing boards for a large measure of statutory autonomy in the supervision, direction and control of their respective institutions and institutional funds. These concepts are expressed in the second sentence of this draft section.

Section 8.05. **Militia.**

The General Assembly may provide by law for a militia. The governor shall be its commander-in-chief and shall appoint its officers. The governor may call out the militia to repel invasions, suppress insurrections, and enforce the execution of the laws. The military power of the State shall be and remain subject to civil control at all times, and only members of the militia when in actual service may be subject to trial by a military court of this State.

Comment:

The provisions of the present Declaration of Rights and Constitution with respect to the military forces of the State, or militia, are found in Articles 28, 29, 30, 31 and 32 of the Declaration of Rights, Article II, Sections 8, 10 and 15 of the Constitution and Article IX of the Constitution, which now consists of two sections.

The five articles of the present Declaration of Rights are the familiar ones declaring that a well regulated militia is the natural defense of a free government, that standing armies are dangerous to liberty and ought not to be maintained without the consent of the General Assembly, that the military ought to be at all times under the control of the civil power, that no soldier should in time of peace be quartered in any house without the consent of the owner nor in time of war except in the manner prescribed by law, and that no person except regular soldiers, marines and mariners in actual service ought to be subject to or punishable by martial law.

Article II, Section 8 of the present Constitution designates the governor as commander-in-chief of the "land and

[291] Under House Bill 551, 1967 session of the General Assembly, Morgan State College would have remained independent. The bill was not passed but was referred to the Legislative Council.

naval forces of the State" and authorizes him to call out the militia to enforce the execution of the laws, but further provides that he shall not take command in person without the consent of the General Assembly. Section 10 provides that the governor shall nominate and, with the consent of the Senate, appoint all military officers whose selection is not otherwise provided for. Section 15 authorizes the governor to suspend or arrest any military officer of the State for disobedience of orders or other military offense and to remove such military officer pursuant to the sentence of a court-martial.

Article IX, Section 1 of the present Constitution directs the General Assembly to make provisions for organizing a militia and to pass laws to promote volunteer militia organizations. Section 2 of this Article provides for an adjutant general to be appointed by the governor and makes certain other provisions with respect to the duties of the adjutant general, the compensation of the adjutant general, and other officers of the general staff of the militia.

The Commission recommends this single draft section to replace and supersede the five articles of the present Declaration of Rights and the five sections of the present Constitution.

The Commission asked General George Gelston, Adjutant General, General Milton A. Reckord, former Adjutant General, and General William U. Ogletree, Assistant Adjutant General of the Maryland National Guard, for an expression of their views on the proposed militia provision. General Reckord, speaking for all three officers, stated that they were satisfied with the provisions of the present Constitution except for the last clause of Article IX, Section 2 limiting payments to officers of the staff. He also indicated, however, that there would be no problems under this draft section with respect to the militia's everyday operations which are presently governed by Article 65 of the Maryland Code.

Almost all state constitutions provide that the military shall be subservient to civil power; and all provide that the governor shall be the commander-in-chief and that the General Assembly shall provide for the organization and maintenance of the militia.[292] These three elements, plus the explicit power given to the governor to call out the militia and appoint its officers, are the substance of this draft section.

The Commission reviewed the historical background of Article 32 of the present Declaration of Rights to ascertain whether the term "martial law" as used therein was intended to prohibit the trial of civilians by military courts, or to prohibit the imposition of military rule on the civilian populace. The investigation showed that the original purpose of Article 32, the provisions of which have not been altered since the Constitution of 1776, was to assure that a civilian would be tried only in a civil court and not in a military court, and that military rule over a civilian community in time of domestic disorder (popularly termed "martial law") was not intended to be proscribed.

The Commission is of the opinion that the prohibition against the trial of civilians in military courts ought to be retained and that there should be included in a new constitution the substance of the provisions now contained in Article II, Section 8 stating the

[292] INDEX DIGEST 691, 701, 706.

purposes for which the governor may call out the militia.

This draft section confers on the governor broad powers to call out the militia, but any abuse of the power to invoke military rule may be resisted in the courts as a deprivation of due process of law under draft Section 1.04 and under the Fourteenth Amendment to the United States Constitution.

Section 8.06. **Interstate Intergovernmental Cooperation.**

This Constitution shall be construed to permit, except to the extent prohibited by law, the cooperation of the government of this State with any other government and the cooperation of the government of any county or other governmental unit with one or more other governments outside the boundaries of the State in the administration of their functions and powers.

Comment:

The Commission recommends the inclusion of this draft section in a new constitution to make it clear that there are no state constitutional obstacles to cooperation between the State or its local subdivisions, and the national government or other state or local governments, to the extent authorized by the General Assembly.

Although it does not appear that any other provision of the draft constitution would prohibit such intergovernmental cooperation, the Commission thinks it desirable to use this means to emphasize the need for an intergovernmental approach to many of the problems now faced by the people of the State. The specific mention of intergovernmental action in the new constitution should make both the electorate and public officials aware of the availability of such an approach.

Section 8.07. **Oath of Office.**

Every person elected or appointed to any office of profit or trust under the Constitution or laws of this State shall, before he enters upon the duties of such office, take and subscribe the following oath or affirmation: "I, ..., do swear (or affirm) that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of Maryland and support the Constitution and laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully, without partiality or prejudice, execute the office of ....., according to the Constitution and laws of this State." No other oath or political test shall be required.

Comment:

This draft section is essentially the same as Article I, Section 6 of the present Constitution with one deletion and one addition.

Article I, Section 6 of the present Constitution requires that before taking office a governor, senator, member of the House of Delegates or judge shall take an oath that he will not directly or indirectly receive the profits or any part of the profits of any other office during his term. This part of the oath has been omitted from this draft section for two reasons.

First, the Commission believes that the provision is wholly inappropriate for an oath of office. If there is to be a prohibition against holding more than one office, it should be stated affirmatively elsewhere in the Constitution.

Second, the Commission recommends the omission from a new constitution of such an affirmative prohibition except with respect to members of the General Assembly under certain circumstances. This prohibition as to members of the General Assembly is included in draft Section 3.09. The Commission has not recommended including anywhere in the draft constitution a provision similar to that contained in Article 35 of the present Declaration of Rights to the effect that no person shall hold at the same time more than one office of profit created by the Constitution or laws of the State. The Commission believes that this subject matter should be left to the General Assembly to be dealt with in the whole setting of conflict of interests, prescribed qualifications for offices, and so forth.

Every state constitution requires an oath of office of its appointed or elected officials and most of the prescribed oaths are in substantially the form of this draft section.[293] Article II, Section 1 of the United States Constitution prescribes the oath of office for the President of the United States and Article VI of the Constitution of the United States provides that "the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; . . . ."

The Commission recommends that the oath prescribed by this draft section be the only one required of any elected or appointed officer of the state. For this reason the Commission has recommended for inclusion in this draft section the last sentence providing that no other oath or political test shall be required. This does not represent a substantive change inasmuch as the concluding clause of Article 37 of the present Declaration of Rights prohibits any oath of office other than the one prescribed by Article I, Section 6.

Section 8.08. **Impeachment.**

The House of Delegates shall have the sole power of impeachment of elected officials, judges and any other state officers who may be designated by law, in cases of serious crimes or serious misconduct in office. The affirmative vote of three-fifths of all the members of the House of Delegates shall be required to impeach. Impeachments shall be tried by a special tribunal of ten judges appointed by the Supreme Court from among the judges of the State. The concurrence of three-fifths of the judges of the special tribunal shall be required to convict. Judgment upon conviction shall be removal from office and may include disqualification from holding any office of public trust, as well as deprivation of pension rights and other privileges of office. A person tried upon impeachment, whether or not convicted, shall be liable to criminal prosecution and punishment according to law.

Comment:

This draft section makes substantial changes in the provisions of Article III, Section 26 of the present Constitution dealing with impeachment. In this draft section the power of impeachment is retained in the House of Delegates, but the trial of an impeachment is by a special tribunal of ten judges appointed by the Supreme Court of the State from among the judges of the State. In Article III, Section 26 of the present Constitution, trial of an impeachment is by the Senate.

[293] INDEX DIGEST 827.

In the present Constitution the affirmative vote of a majority of all members of the House of Delegates is required for impeachment; in this draft section the affirmative vote of three-fifths of all the members of the House of Delegates is required for impeachment.

In the present Constitution the concurrence of two-thirds of all the senators is required for conviction; in this draft section the concurrence of three-fifths of the judges of the special tribunal is required for conviction. The Commission is aware of the fact that in this particular situation the concurrence of three-fifths of the judges is the same as the concurrence of a majority, namely, six judges. It, nevertheless, believes that it is desirable to include this requirement to indicate that six judges are more than a simple majority.

The next to the last sentence of this draft section has been added to make it abundantly clear that upon conviction after impeachment, the penalty in every case shall be removal from office, but may also include disqualification from holding any office of public trust as well as deprivation of pension rights and other privileges of the office. These latter penalties are not mandatory, but may be imposed in the discretion of the special tribunal of judges. The last sentence, in addition, makes it clear that impeachment, whether or not followed by conviction, does not relieve the impeached person of responsibility under the criminal laws.

Impeachment has not been resorted to in Maryland for more than one hundred years. Nonetheless, the Commission believes that the existence of such an extraordinary removal procedure is desirable. It is included in the constitutions of practically every state.[294] It is also provided for in Article I, Sections 2 and 3 and Article II, Section 4 of the United States Constitution.

The Commission debated at some length the question of whether the trial of an impeachment should be before the Senate as is provided in the present Constitution and in the United States Constitution, or before some other tribunal. It will be remembered that in the federal Constitutional Convention of 1787 there was considerable debate as to whether impeachments should be tried by the Senate or by the Supreme Court of the United States, and approval of the provision for trial of impeachment cases by the Senate was by a relatively narrow margin.

The Commission believes that the trial of an impeachment, as the trial of any other case, is essentially a judicial proceeding for which a branch of the legislature is ill-suited. The Commission further believes that every precaution should be taken to insure that trial of an impeachment will be free of any partisan character and will be conducted by experienced triers of fact and of law. It is for these reasons that the Commission has recommended that this draft section provide for trial of impeachment cases by a special tribunal of ten judges. Wide latitude is given to the Supreme Court in determining the composition of the special tribunal in order that an impartial panel of judges may be obtained regardless of the identity of the officer impeached.

The Commission believes that this draft section represents a substantial improvement upon the provisions of the present Constitution with respect to impeachment.

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[294] INDEX DIGEST 534-35.

ARTICLE IX. AMENDMENT OF THE CONSTITUTION

Introductory Comment:

This draft article sets forth the procedure by which the constitution may be revised. The Commission recommends that the people of Maryland adopt a new constitution which is both a brief and a general document with the limitations on governmental power expressed in general terms, and which leaves to the future discretion of the General Assembly the details of governmental organization, administration and authority. Although the Commission believes that such a basic document will be flexible enough so that without change in the basic language it can be interpreted to meet the demands of a rapidly expanding and changing society, the Commission is, nevertheless, aware that the social, economic, technological and political forces which interact to shape society may change, with a resulting need for growth or change in the state constitution. Since good government must be responsive to changes in society and since it is not possible to foresee all the problems with which society may be faced in the future, there must be provision in a new constitution for the constitution's alteration.

Alteration of a state constitution may take various forms: change by interpretation, change by amendment, and change by major revision. Change by interpretation occurs by the action of governors, legislatures, courts and the people; although the detailed language of the present Constitution leaves less room for change and growth by interpretation than is the case with the constitution of the federal government. A striking example of change by interpretation is the approval of "revenue bonds" issued by the State or its agencies, notwithstanding the prohibitions and restrictions of Article III, Section 34 of the present Constitution with respect to state indebtedness.

Change by amendment is the method most frequently used in Maryland for altering the State's basic document. Since the ratification of the present Constitution in 1867, there have been 145 specific amendment questions submitted to the voters of Maryland. Of these, 124 have been adopted, with the effect that whatever were the original benefits of brevity and generality of the 1867 Constitution, they have been lost. Some fourteen other states have amended their constitutions over seventy times each. In some states, the amending process is resorted to infrequently, and in others very often. Tennessee was unable to amend its 1870 Constitution until 1953; whereas, the California Constitution of 1879 has been amended over 370 times.

Amendments to state constitutions are generally initiated by three methods: (1) Through legislative action, (2) through state convention, and (3) through formal initiative petitions. Whereas most states allow the use of either of the first two methods, only thirteen states permit amendments to be initiated directly by the people through the use of the initiative petition, requiring a specified number of signatures on the petition.[295]

[295] For a discussion of the process of initiating amendments to constitutions by initiative petition and for an enumeration of those states which permit this method of constitutional change, see GRAVES, MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 25-27 (1960).

Except New Hampshire, all states provide at least technically for some method of legislative initiation. While sixteen states allow a majority of the members elected to initiate an amendment, most states require an extraordinary vote of the members elected to each house. About a dozen states require that an amendment, to be initiated, must be passed by extraordinary vote at two successive legislative sessions. The Maryland Constitution of 1776 had such a provision.

A constitutional convention, although primarily an instrument for drafting an entirely new constitution, is also used for the purpose of initiating amendments to an existing document. In New Hampshire, as was the case in Maryland's 1851 Constitution, this is the only method set forth for initiating amendments. In those states where the constitution makes no provision for the calling of a constitutional convention, constitutional lawyers have contended that conventions can always be called as an inherent right of the people acting through their elected representatives. Where conventions have been held in such states, the courts have found the procedure valid.[296] Eleven states provide that the question of calling a convention must be submitted to the electorate at stated intervals regardless of the attitude of the legislature on the matter.

Except in Delaware, where the legislature can amend the constitution by its own action, ratification of amendments by the people is required regardless of the method used for initiating the amendment.

Change by revision, although occasionally initiated directly by a state legislature, is more frequently initiated by a constitutional revision commission which is the creature of the legislature and which, after preparing its recommendations, submits its proposals to the legislature for approval before such recommendations are submitted to the voters. Another method of change by revision and the only one common to all of the fifty states is the constitutional convention. The constitutional convention is the first and basic legislative body in the sense that it establishes a framework for the determination of public policy. The nation has seen well over two hundred state constitutional conventions.

Maryland has had four constitutional conventions, those of 1776, 1850, 1864 and 1867. This method of constitutional change, based upon the people's election of delegates for the specific purpose of constitutional revision, carries with it a sanction and a prestige not found in other methods. Historically and legally, the convention is the direct "voice of the people" in matters affecting general constitutional change.[297]

The instrument of government prepared by a constitutional convention or by a legislature is normally submitted to the voters for their approval or rejection, since the right of the people to have a voice in the formulation of their basic law would appear to be so fundamental as to be beyond argument. In 1874 Chief Justice Agnew of the Supreme Court of Pennsylvania stated that court's opinion that "nothing in the nature of delegated power . . . can take from the people their sovereign right to ratify or reject a constitution or ordinance framed by it, or can infuse present life and vigor

[296] Wells v. Bain, 75 Pa. 39 (1873).

[297] JAMESON, THE CONSTITUTIONAL CONVENTION (1867).

into its work before its adoption by the people."[298]

In Maryland, the Constitution of 1776 was adopted without the ratification of the electorate. However, the Constitutions of 1851, 1864 and 1867 were each ratified by the electorate in a referendum. Almost without exception, the state constitutions of the twentieth century have been submitted to the people for their ratification.

The Commission believes that this draft article will permit constitutional amendment and revision whenever there is popular demand for change. On the other hand, the Commission also believes that the amendatory power should not be used merely to accomplish temporary purposes. The Commission is of the opinion that the provisions of this draft article strike the right balance between encouraging constitutional stability and guaranteeing the electorate's ultimate control over its basic instrument of government.

Section 9.01. **Amendments.**

An amendment to this Constitution may be proposed either by the affirmative vote of three-fifths of all the members of each house of the General Assembly or by the vote of a majority of all the members of a constitutional convention called by the General Assembly. In either case, the proposed amendment shall be submitted to the voters of the State at a special or general election as determined by the General Assembly or the Convention, whichever proposes the amendment. Notice of the election shall be given as prescribed by law. Unless otherwise provided, the amendment shall become effective thirty days after approval by the vote of a majority of those voting thereon.

Comment:

This draft section permits either the General Assembly or a constitutional convention to initiate constitutional amendments. In this regard, the draft section is similar to Article XII of the Model State Constitution. However, unlike the Model, this draft section does not provide for the proposal of constitutional amendments directly by the people through the use of the initiative petition. The initiative petition procedure has been promoted as a desirable tool for overcoming the inaction of recalcitrant mal-apportioned legislatures. However, with the breaking of the log-jam on reapportionment by the decision of the United States Supreme Court in *Baker v. Carr*,[299] the Commission believes that there no longer exists any reason for providing an alternative to the General Assembly and constitutional conventions for initiating amendments to the constitution.

While the Commission does not believe it desirable for an amendment provision to require the General Assembly to pass a proposed amendment at two successive sessions of the legislature before it can be submitted to the electorate for its ratification, the Commission does believe that the affirmative vote of three-fifths of all the members of each house of the General Assembly should be required before a constitutional amendment can be initiated by the legislature. Hopefully, such a restriction would discourage improvident legislative action. As previously noted, most state constitutions do require more than a simple majority vote in one or both houses.

[298] Wood's Appeal, 75 Pa. 59 (1874).

[299] Baker v. Carr, 369 U. S. 186 (1962).

This draft section requires that all amendments to the constitution be ratified by the electorate. The Commission believes that a popular referendum is the proper method for ratifying any proposed constitutional change, and that it is the only appropriate method where the constitution itself has been ratified by the electorate. The Commission recommends that ratification of proposed constitutional amendments be by a majority of those voters who vote on the question.

Although the amendment provisions of some state constitutions require that ratification of proposed amendments be by a majority of those voters who vote in the election, the Commission strongly suggests that such a limitation should not be imposed upon the power of the electorate. It has been repeatedly demonstrated that voter interest is far greater in electoral contests than in questions on constitutional amendments. The median vote, both for and against, on the sixteen proposed constitutional amendments which were on the ballot in the 1966 general election in Maryland was only thirty per cent of the total vote cast for governor. Therefore, were constitutional amendments permitted only in those cases where they received approval by a majority vote of all those voters who vote in the election, rather than a majority vote of all those voters who vote on the particular question, amendment of the constitution would become almost an impossibility.

The Commission does not believe it necessary for a constitutional provision to prescribe a minimum time which must elapse between the time when an amendment is proposed and the time when it is submitted to the electorate for ratification. This draft section only prescribes that a ratification election must be preceded by "due notice" as prescribed by the General Assembly. It is to be hoped that the minimum time lapse will be great enough to afford the electorate an opportunity for discussion of the merits of any proposed amendment.

Section 9.02. **Constitutional Convention.**

The General Assembly may by law call a constitutional convention at any time or may at any time submit to the voters of the State the question of calling a constitutional convention. If the question of calling a convention shall not have been submitted to the voters of the State for a period of twenty years, then it shall be submitted at the next general election. A convention shall be held within one year after a majority of those voting on the question approve the calling of a convention. Within sixty days after such approval, the governor shall appoint a commission to prepare for the convention. At its next regular session following such approval, the General Assembly shall provide by law for the assembling of the convention, the election of delegates, the filling of vacancies in the position of delegate, and the appropriation of sufficient funds for the work of the convention. The convention shall adopt its own rules of procedure. Any proposal recommended by the convention for changing the constitution shall be submitted to the voters of the State for adoption, and shall be effective only if approved by the affirmative vote of a majority of those voting thereon.

Comment:

The constitutional convention has been the historical method in Maryland for revising the state constitution. Although the General Assembly, un-

doubtedly, has the inherent power to convene a constitutional convention at any time, the Commission recommends that a new constitution give specific recognition to the valuable prerogative of the people to call a constitutional convention, by including a provision affirming the right of the General Assembly to call a convention and one prescribing that the question of calling a convention must be periodically placed before the people.

Unlike the provision of Article XIV, Section 2 of the present Constitution which requires that the General Assembly provide by law for taking "the sense of the People" in 1970 and every twenty years thereafter in regard to calling a convention for altering the Constitution, this draft section provides that if the question of calling a convention has not been considered by the voters of the State for a period of twenty years, then it shall be submitted at the next general election. In this way the Commission believes it has ensured that the opportunity of the electorate to express its will on the calling of a convention will not be defeated by legislative inaction.

Noting the failure of the General Assembly to provide for a constitutional convention following the favorable votes of the State's electorate in 1930 and 1950, the Commission recommends that there be a requirement that a convention be held within one year after the electorate approves the calling of a convention to ensure that a convention will be held within a reasonable time after its approval. This draft section would further require the appointment by the governor of a commission to prepare for any convention which is called, within sixty days of the convention's approval, and would require the General Assembly to enact an enabling act for the convention at its next regular session. The Commission believes that pre-convention preparation is indispensable to successful constitutional revision.

Since a constitution provides the framework for the government of the people, the Commission recommends that any change in the basic document, either by alteration or revision, be required to be ratified by a majority of those voters voting on the question before it can become effective.